Supreme Court, U.S.
FILED

021293 MAR 3 2003

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ANN COHEN; GLENN CRAIG; JAMES EMBRY; SUSAN FISCHER, IN THEIR INDIVIDUAL CAPACITIES,
Petitioners,

v.

NATASHA THOMAS; SUSAN GIBBS; EDWINA LEWIS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PAUL V. GUAGLIARDO
Counsel of Record

PAUL V. GUAGLIARDO
GREGORY SCOTT GOWEN
JEFFERSON COUNTY ATTORNEY'S OFFICE
601 WEST JEFFERSON STREET, ROOM 200
LOUISVILLE, KENTUCKY 40202
(502) 574-3511

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

85 pp

QUESTIONS PRESENTED

1. Whether police officers, by directing tenants to obey landlord's unlawful directive to leave, violated tenants' right to procedural due process under the Fourteenth Amendment when tenants had an adequate remedy under state landlord-tenant law.

2. Whether the Sixth Circuit erred in concluding that *Parratt v. Taylor,* 451 U.S. 527 (1981) is "outdated" in light of *Zinermon v. Burch,* 494 U.S. 113 (1990).

3. Whether the Court's Fourteenth Amendment jurisprudence was so clearly established that the police officers should have known that they were violating tenants' procedural due process rights.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners

Petitioners are police officers employed by the former City of Louisville, Kentucky, now known as Louisville-Jefferson County Metro Government, sued in their individual capacities. Each petitioner is a citizen of the United States, residing in the Western District of Kentucky. Petitioners were the defendants in the district court, and the appellants in the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit").

Respondents

Respondents are individual citizens of the United States. Petitioners do not know where respondents currently reside. Respondents were the plaintiffs in the district court, and the appellees in the Sixth Circuit.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

I. Overview of the Case 2

II. Background of the Case 3

III. Disposition by the Lower Courts 5

Reasons for Granting the Petition 7

I. The Sixth Circuit Erroneously Concluded That in Light of *Zinermon* the *Parratt/Hudson* Doctrine is "Outdated." 8

II. There is Confusion Among the Circuits Regarding *Zinermon's* Effect on the *Parratt/Hudson* Doctrine 10

III. In Denying Qualified Immunity to the Officers, the Sixth Circuit Decision Conflicts with the Court's "Fair Warning" Standard in *Hope v. Pelzer* . . . 14

Conclusion 17

Appendix 1a

Appendix A - Sixth Circuit Denial of Petition for Rehearing - 12/03/02 . . . . . 1a

Appendix B - Sixth Circuit Opinion - 08/23/02 . 3a

Appendix C - District Court Memorandum Opinion and Order - 12/15/00 . . . . . 49a

TABLE OF AUTHORITIES

CASES

Caine v. Hardy, 943 F.2d 1406 (5th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992) 12

Charbonnett v. Lee, 951 F.2d 638 (5th Cir. 1992), *cert. denied*, 505 U.S. 1205 (1992) 12

Cofield v. Randolph County Comm'n, 90 F.3d 468 (11th Cir. 1996) 15, 17

Daniels v. Williams, 474 U.S. 327 (1986) 7

Easter House v. Felder, 901 F.2d 1387 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991) 12, 13

Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) 8, 10

Flatford v. City of Monroe, 17 F.3d 162 (6th Cir. 1994) 15, 16

Fuentes v. Shevin, 407 U.S. 67 (1972) 15

Gable v. City of Chicago, 296 F.3d 531 (7th Cir. 2002) 13

Haverstick Enterprises, Inc. v. Financial Credit, Inc., 32 F.3d 989 (6th Cir. 1994) 15, 16

Herwins v. City of Revere,
163 F.3d 15 (1st Cir. 1998) 12, 13

Hope v. Pelzer, ___ U.S. ___,
122 S.Ct. 2508 (2002) 7, 14, 15, 17

Hudson v. Palmer, 468 U.S. 517 (1984) . . . . . Passim

Mathews v. Eldridge, 424 U.S. 319 (1976) 11

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5

O'Neill v. Baker, 210 F.3d 41 (1st Cir. 2000) 12, 13

Parratt v. Taylor, 451 U.S. 527 (1981),
overruled in part by Daniels v. Williams,
474 U.S. 327 (1986) . . . . . Passim

Powell v. Georgia Dept. of Human Resources,
114 F.3d 1074 (11th Cir. 1997) 13

Reese v. Kennedy, 865 F.2d 186 (8th Cir. 1989) 8

Saucier v. Katz, 533 U.S. 194 (2001) 14, 15, 17

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 15

Wilson v. Layne, 526 U.S. 603 (1999) 14

Zinermon v. Burch, 494 U.S. 113 (1990) . . . . . Passim

CONSTITUTION AND STATUTES

U.S. Constitution Fourth Amendment 3, 5, 6, 16, 17

U.S. Constitution Fourteenth Amendment . . . . . Passim

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 2, 3

K.R.S. § 383.200 (2002) 2

K.R.S. §§ 383.500-383.715 (2002) 2

K.R.S. § 383.520 (2002) 2, 4

K.R.S. § 383.615(4) (2002) 2

K.R.S. § 383.655 (2002) 2, 4

K.R.S. § 383.690 (2002) 2, 5

Petitioners, Officers Ann Cohen, Glenn Craig, James Embry, and Susan Fischer ("officers"), petition for a writ of certiorari to review the judgment of the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion is reported at 304 F.3d 563 (6th Cir. 2002), and reprinted at App. 3a-48a. The Sixth Circuit's order denying the officers' request for panel rehearing and rehearing *en banc* is reprinted at App. 1a-2a. The December 15, 2000 unreported memorandum opinion and order of the District Court that prompted the Sixth Circuit appeal is reprinted at App. 49a-60a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its opinion on August 23, 2002, after which the officers timely filed a petition for panel rehearing and for rehearing *en banc*. The Sixth Circuit entered an order on December 3, 2002, denying the petition for panel rehearing and for rehearing *en banc*. This petition for writ of certiorari is timely because it was filed within 90 days of December 3, 2002.

Pursuant to 28 U.S.C. §1254(1), this Court has jurisdiction to review a final opinion of the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 to the United States Constitution states in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of

law ....

42 U.S.C. § 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ....

The Kentucky Uniform Residential Landlord and Tenant Act prohibits "self help" evictions by landlords, Ky. Rev. Stat. Ann. ("K.R.S.") §§ 383.615(4); 383.690 (2002), and provides a remedy to tenants wrongfully evicted. K.R.S. §§ 383.520; 383.655 (2002).

Kentucky law requires written notice prior to termination of a lease, K.R.S. §§ 383.500-383.715 (2002), and "forcible detainer" actions by a landlord upon the refusal of a tenant to deliver possession. K.R.S. §§ 383.200; 383.615(4) (2002).

STATEMENT OF THE CASE

I. Overview of the Case

On August 23, 2002, a divided panel of the Sixth Circuit (Circuit Judges Gilman, Clay and Wallace[1]) affirmed

---

[1] The Honorable J. Clifford Wallace, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

the district court's denial of qualified immunity to the officers on respondents' due process claims under the Fourteenth Amendment. The Sixth Circuit's decision is inconsistent with this Court's Fourteenth Amendment procedural due process and 42 U.S.C. § 1983 qualified immunity jurisprudence.

II. Background of the Case

Respondents, Natasha Thomas, Susan Gibbs, and Edwina Lewis, filed suit against the officers, seeking monetary damages under 42 U.S.C. § 1983 for alleged violations of respondents' rights under the United States and Kentucky constitutions. Specifically, respondents claimed that the officers violated their Fourth Amendment right to be secure in their property against unreasonable seizures, their Fourteenth Amendment right to procedural due process before being deprived of property, and their rights under the Kentucky constitution which mirror these federal rights.

The relevant facts are, for the most part, not disputed.[2] This case stems from an incident that occurred on December 8, 1998, at the Augusta House, which is part of a private, long-term transitional shelter for women operated by Mission House, Inc. in Louisville, Kentucky. App. 4a-8a. Respondents resided at the shelter. The shelter manager ordered respondents to leave the shelter because she believed that they had violated shelter rules forbidding illegal drug and alcohol use. The respondents refused to leave. The shelter manager called the police department for assistance. The officers were dispatched to the scene. App. 7a-8a.

---

[2] The officers concede that this Court must accept all of respondents' factual allegations as true for purposes of this petition, including their claimed status as tenants.

The shelter manager did not have a court order. She told the officers that eviction was "standard procedure" under the circumstances and asked the officers to assist in the removal of respondents from the shelter. App. 8a. Respondents claim that they informed the officers that they paid monthly rent to the Augusta House and showed or offered to show the officers a letter from the Louisville Tenants Association indicating that the shelter manager must follow Kentucky's forcible detainer procedures in order to evict respondents. App. 5a-8a. The officers, at the request of the shelter manager, ordered respondents to gather their belongings and comply with the manager's directive to leave the shelter.

Kentucky law expressly prohibits "self-help" evictions. Under state law, landlords must provide written notice prior to termination of the lease and must file a "forcible detainer" action in court if the tenant refuses to deliver possession. App. 5a., n.1. The officers knew that "the Sheriff's Department, not the police, carried out court-ordered evictions in Louisville." App. 26a. It is uncontroverted that if respondents were tenants, the shelter manager's attempt to evict them without a court order was unlawful. Kentucky law provides statutory remedies to tenants for wrongful eviction. K.R.S. §§ 383.520; 383.655.

There was no physical confrontation during the removal of the respondents from the shelter, and none of respondents' personal property was destroyed. App. 8a. No arrests were made. No touching or use of physical force occurred.

The next day, December 9, 1998, respondents filed a wrongful eviction complaint in state court under Kentucky's Uniform Residential Landlord and Tenant Act seeking a

temporary injunction and restraining order against Mission House, Inc. In that complaint, respondents alleged that Mission House, Inc. failed to follow the provisions of K.R.S. § 383.690 before evicting them. The landlord-tenant action was dismissed on December 11, 1998, pursuant to a "Mutual Release Agreement" signed by respondents and an attorney for Mission House, Inc. On December 10, 1998, and pursuant to the "Mutual Release Agreement," respondents took up residency at Emmaus House, another facility operated by Mission House, Inc., where they were allowed to remain until they found alternate housing or the lapse of sixty (60) days, whichever occurred first. App. 9a, n. 4.

III. Disposition by the Lower Courts

The officers filed a motion for summary judgment on the grounds that no constitutional violation had occurred and that they were entitled to qualified immunity. The district court denied the officers' motion for summary judgment. App. 49a-60a. The district court held that the officers violated respondents' rights under the Fourth and Fourteenth Amendments. The district court also held that those rights were clearly established and that the officers were not entitled to qualified immunity. *Id.*

The officers appealed the district court's decision to the Sixth Circuit as a final judgment under the collateral order doctrine. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). On appeal, a divided panel consisting of Judges Gilman and Wallace held that whether a seizure occurred under the Fourth Amendment was "anything but clear." App. 41a. Judge Gilman, writing for the majority on the Fourth Amendment claim, stated that he was "hard-pressed to conclude that the eviction in this case was a seizure of property at all, much less that precedent made it clear to the officers that their

conduct in fact constituted such a seizure." App. 42a. Accordingly, the panel reversed that part of the district court's decision denying qualified immunity to the officers and held that respondents were not entitled to proceed to trial on their Fourth Amendment claims. App. 40a and 43a.

A differently divided panel consisting of Judges Clay and Gilman affirmed the district court's Fourteenth Amendment due process decision. Judge Clay, writing for the majority on the Fourteenth Amendment claim, concluded that the officers violated respondents' procedural due process rights under the Fourteenth Amendment by assisting the shelter manager in evicting respondents. He further concluded that these rights were so clearly established that the officers' claims of qualified immunity were defeated. App. 27a-40a. Judge Gilman concurred with the result stating only that, "at least at the summary judgment stage, the police officers in the present case are not entitled to qualified immunity with regard to the [respondents'] due process claims under the Fourteenth Amendment." App. 40a.

With respect to respondents' Fourteenth Amendment due process claims, Judge Wallace agreed with the majority that respondents "had a constitutional right to predeprivation process – assuming, as we are for purposes of this appeal, that [respondents] were deprived of a property interest by virtue of their status as alleged tenants." App. 44a. However, Judge Wallace dissented from the majority on the issue of whether that "right was clearly established" so as to defeat qualified immunity given the "undisputed" evidence regarding the circumstances confronted by the officers at the Augusta House. App. 44a-48a.

The officers petitioned for a panel rehearing and an *en banc* rehearing by the Sixth Circuit. That petition was denied

on December 3, 2002. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The divided Sixth Circuit panel which upheld respondents' procedural due process claims ("majority opinion" or "majority") held that:

1) The officers violated respondents' rights to procedural due process when the officers assisted the shelter manager in evicting respondents without affording them an opportunity to be heard at any type of pre-deprivation hearing;

2) Any sort of post-deprivation remedy would be inadequate; and

3) In light of clearly established law applicable on the date of the eviction, the officers were not entitled to qualified immunity.

App. 27a-40a.

With this petition, the officers ask the Court to grant a writ of certiorari to the Sixth Circuit to clarify whether *Parratt v. Taylor,* 451 U.S. 527 (1981) *overruled in part by Daniels v. Williams,* 474 U.S. 327 (1986) and *Hudson v. Palmer,* 468 U.S. 517 (1984) are "outdated" after *Zinermon v. Burch,* 494 U.S. 113 (1990); and to clarify the type of precedent that constitutes "fair warning" sufficient to defeat qualified immunity under *Hope v. Pelzer,* ___ U.S. ___, 122 S.Ct. 2508 (2002).

I. The Sixth Circuit Erroneously Concluded That in Light of *Zinermon* the *Parratt/Hudson* Doctrine is "Outdated."

The *Parratt/Hudson* doctrine provides that the "deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." *Hudson,* 468 U.S. at 533; *Parratt,* 451 U.S. at 543. The *Parratt/Hudson* doctrine applies to deprivations of property that result from a "random and unauthorized act by a state employee ... [and] not a result of some established state procedure." *Parratt,* 451 U.S. at 541.

The reasoning supporting the doctrine is that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest ... is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 642-43 (1999) (quoting *Zinermon v. Burch,* 494 U.S. 113, 125 (1990)). Any holding to the contrary would "result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983." *Parratt,* 451 U.S. at 544.

Reese v. Kennedy, 865 F.2d 186 (8th Cir. 1989) is a case similar to the present case. In *Reese,* the police officers had no court order. They threatened to arrest plaintiff if she did not leave. She was not allowed to retrieve her property. Following the *Parratt/Hudson* doctrine, the Eighth Circuit held that the police officers' failure to follow eviction procedures did not violate tenant's procedural due process

rights because she had adequate post-deprivation remedies. *Id.* at 187.

The Sixth Circuit majority recognized the Eighth Circuit's holding that an extrajudicial police eviction was the type of "random" conduct at issue in *Parratt*. App 34a. The majority concluded, however, that the Eighth Circuit had relied upon an "outdated interpretation" of *Parratt* because "*Parratt* has since been called into question" by *Zinermon v. Burch,* 494 U.S. 113 (1990). App. 34a. Accordingly, the majority held that the *Parratt/Hudson* doctrine did not preclude respondents' procedural due process claims. In rejecting *Parratt,* the majority acknowledged that Kentucky law afforded post-deprivation remedies to respondents. App. 9a, n. 4. Yet, the majority concluded that "post-deprivation remedies of any sort would be inadequate" in this matter. App. 36a.

Zinermon specifically instructed that the threshold question in Fourteenth Amendment procedural due process analysis is "what process the state provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into" the system and "any remedies for erroneous deprivations provided by statute ...." *Zinermon,* 494 U.S. at 126.

In the present case, respondents had a post-deprivation remedy provided by state law. They availed themselves of their remedy the day after the incident when they filed a wrongful eviction complaint under Kentucky's Uniform Residential Landlord and Tenant Act seeking a temporary injunction and restraining order against Mission House, Inc. App. 9a, n. 4. Respondents make no claim that Kentucky's statutory procedures for wrongful eviction are inadequate. They only claim that the officers failed to follow pre-eviction

procedure. This seems to be the kind of situation that the Court contemplates being handled in state court:

> [I]n challenging a property deprivation, the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate .... When adequate remedies are provided and followed, no ... deprivation of property without due process can result.

Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 643 (1999) (quoting *Hudson v Palmer,* 468 U.S. 517, 539 (O'Connor, J., concurring)).

If the Sixth Circuit's published opinion is permitted to stand, litigants in the Sixth Circuit will be governed by precedent holding that the *Parratt/Hudson* doctrine is "outdated" as a result of *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). The Court's *dicta* in *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,* 527 U.S. 627, 643 (1999) suggests otherwise. Review by the Court is important so that the Fourteenth Amendment does not become a "font of tort law" within the Sixth Circuit and to clarify the Fourteenth Amendment's "role in our society." *Parratt,* 451 U.S. at 544.

II. Review is Necessary to Resolve the Confusion Among the Circuits Regarding *Zinermon's* Effect on the *Parratt/Hudson* Doctrine.

In the present case, the majority interpreted *Zinermon* to mean that the adequacy of post-deprivation remedies was of no relevance in determining whether respondents'

procedural due process rights were violated: "Therefore, postdeprivation remedies of any sort would be inadequate." App. 36a. The majority also concluded that because Kentucky law provides for pre-deprivation process prior to evictions, *Parratt* does not apply. App. 35a-36a. The officers' disregard of those state procedures was not, according to the majority, "unpredictable." App. 36a.

In *Zinermon,* the Court granted certiorari to resolve the conflict in the courts of appeals over the proper scope of the *Parratt* rule. *Zinermon,* 494 U.S. at 116, n. 2. The dissent in *Zinermon* warned that *Zinermon's* majority opinion would engender confusion:

> [The majority opinion] marks out a vast terra incognita of unknowable duties and expansive liability of constitutional dimension.... Despite the many cases of this Court applying and affirming *Mathews* [*v. Eldridge,* 424 U.S. 319 (1976)], it is unclear what now remains of the test.... This resulting "no man's land" has no apparent boundaries. We are provided almost no guidance regarding what the Due Process Clause requires, how that requirement is to be deduced, or why fundamental fairness imposes upon the States the obligation to provide additional safeguards of nearly any conceivable value. We are left only with the implication that where doubt exists, liability of constitutional dimension will be found.

Zinermon, 494 U.S. at 149 (O'Connor, J., Rehnquist, C.J.,

Scalia J., Kennedy, J., dissenting).[3] As the Sixth Circuit majority opinion demonstrates, the dissent's prophesy has come to pass.

Other circuits hold that *Zinermon* did not affect the viability of the *Parratt/Hudson* doctrine. These circuits continue to follow the Court's instruction that the adequacy of a post-deprivation remedy is critical in determining whether a procedural due process claim under the Fourteenth Amendment has been stated.

The First Circuit has rejected the view that *Zinermon* "undermined" the *Parratt/Hudson* doctrine holding that "the *Parratt/Hudson* doctrine plays an important part in allowing procedural claims to be resolved in state forums where states do provide adequate remedies." *O'Neill v. Baker,* 210 F.3d 41, 50 (1st Cir. 2000); *Herwins v. City of Revere,* 163 F.3d 15, 19 (1st Cir. 1998) (no denial of procedural due process so long as the state provides an adequate means of redress).

The Fifth Circuit has pointed out that "the courts of appeals have not found *Zinermon* easy to interpret" and that *Zinermon's* principles "represent a *sui generis* situation." *Caine v. Hardy,* 943 F.2d 1406, 1415 (5th Cir. 1991), *cert. denied,* 503 U.S. 936 (1992). Similarly, *Zinermon* has been read "to effect only a 'wrinkle' on the *Parratt/Hudson* doctrine." *Charbonnett v. Lee,* 951 F.2d 638, 642 (5th Cir. 1992), *cert. denied,* 505 U.S. 1205 (1992).

---

[3] The majority opinion in *Zinermon* has been criticized for leaving "judges of the inferior federal courts in a difficult position" in reconciling and applying the case. *See, e.g., Easter House v. Felder,* 901 F.2d 1387, 1409 (7th Cir. 1990), *cert denied,* 498 U.S. 1067 (1991) (Easterbrook, J., concurring).

Likewise, the Seventh Circuit has rejected the theory that *Zinermon* has limited the application of the *Parratt/Hudson* doctrine. *Gable v. City of Chicago,* 296 F.3d 531, 539-40 (7th Cir. 2002) (*Parratt/Hudson* doctrine forecloses procedural due process claims when state provides adequate post-deprivation remedy); *Easter House v. Felder,* 910 F.2d 1387, 1400 (7th Cir. 1990), *cert. denied,* 498 U.S. 1067 (1991) (*Zinermon* only narrowed the scope of the *Parratt/Hudson* doctrine in certain factual circumstances).

In *Powell v. Georgia Dept. of Human Resources,* 114 F.3d 1074 (11th Cir. 1997), the Eleventh Circuit applied the *Parratt/Hudson* doctrine, not *Zinermon,* when state caseworkers failed to follow established protocols and the state provided adequate post-deprivation remedies.

As indicated by the cases cited above, the availability of an adequate post-deprivation remedy remains relevant in some circuits in determining whether there has been a violation of procedural due process rights under the Fourteenth Amendment. Other courts hold that if official policy exists that would have protected the plaintiff's interests if followed, then the failure to follow the policy is random and unauthorized. *O'Neill,* 210 F.3d at 50; *Herwins,* 163 F.3d at 19.

The Sixth Circuit majority held that the principles established in *Parratt* and *Hudson* have been "called into question" by *Zinermon.* App. 34a. Review by the Court is necessary to clear up the confusion among the circuits caused by *Zinermon.*

III. In Denying Qualified Immunity to the Officers, the Sixth Circuit Decision Conflicts with the Court's "Fair Warning" Standard in *Hope v. Pelzer*.

In deciding whether the officers were entitled to qualified immunity, the issue before the Sixth Circuit was whether a reasonable officer should have known that assisting a landlord in evicting respondents was unlawful "in light of clearly established law and the information the officers possessed" at the time. *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

The Court reaffirmed *Wilson* when it instructed that "[t]his inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition ...." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Court went on to explain:

> The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine ... will apply to the factual situation the officer confronts. An officer might correctly perceive all the relevant facts but have a mistaken understanding .... If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205.

In a recent decision, the Court has further clarified the standard for determining whether a state actor's conduct violates "clearly established law." *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002). To paraphrase the Court, "the salient question" is whether the state of the law in 1998 gave the officers "fair warning" that ordering the respondents to comply with the shelter manager's directive to leave was unconstitutional. *Hope,* 122 S.Ct. at 2516.

In rejecting the officers' qualified immunity defense, the panel relied on two decisions from this Court, *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); two decisions from the Sixth Circuit, *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994) and *Haverstick Enterprises, Inc. v. Financial Credit, Inc.*, 32 F.3d 989 (6th Cir. 1994); and a decision from the Eleventh Circuit, *Cofield v. Randolph County Comm'n,* 90 F.3d 468 (11th Cir. 1996). App. 36a-40a.

Fuentes and *Good Real Property* stand for the general proposition that before a person's property is confiscated, he must be afforded due process protections including the right to deprivation notice and a hearing. But *Fuentes* was a challenge to a state statute authorizing pre-judgment seizure of goods without a hearing. *Good Real Property* invalidated the government's attempt to exert its own interest over forfeitable real property without prior notice and a hearing. The Court instructs that more than broad general propositions are necessary to defeat qualified immunity, *Saucier*, 533 U.S. at 201-202, even though previous cases need not be "fundamentally similar" or "materially similar" to give "fair warning." *Hope,* 122 S.Ct. at 2516.

Haverstick Enterprises, Inc. v. Financial Credit, Inc., 32 F.3d 989 (6th Cir. 1994) was not a landlord-tenant case but rather a case of repossession of a vehicle by a creditor. The case involved the actual "seizure" of property. *Id.* at 994. The officer knew a vehicle was being seized as he stood by. The *Haverstick* court did not address the application of the *Parratt/Hudson* doctrine or the Court's decision in *Zinermon*.

In *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994), unlike the private eviction in the present case, the government was trying to evict the tenants under the City's housing code. The Sixth Circuit held that the City building inspector was not entitled to qualified immunity because *he* was the one, on behalf of the City, to afford post-deprivation process and failed to do so. *Id.* at 168-169 (citing *Zinermon*).

As far as what the police officers in the instant case should have known, however, *Flatford* is silent. In *Flatford,* the assisting officers knew that the Flatfords were "tenants." Yet *Flatford* did not address the Fourteenth Amendment implications of the officers' assistance in the evacuation of the building. The decision only addressed the officers' action in the context of the Fourth Amendment. There was no holding in *Flatford* that officers assisting in a private, landlord-tenant dispute (*Flatford* was a governmental instigated condemnation or eviction) violate the Fourteenth Amendment rights of the tenant. In *Flatford*, there was no attempt to analyze the assisting officers' conduct in light of *Parratt*, *Hudson*, or *Zinermon*. The issue the Court is asked to review is whether an officer has been given "fair warning" of conduct that violates the Fourteenth Amendment by a previous case that does not address an officer's conduct in Fourteenth Amendment terms?

In *Cofield v. Randolph County Comm'n,* 90 F.3d 468 (11th Cir. 1996), a vehicle was repossessed while a deputy sheriff was present. The Eleventh Circuit only discussed the sheriff's possible liability in terms of the Fourth Amendment if the repossession was a "seizure." *Id.* at 471. There is virtually no discussion of the Fourteenth Amendment and no mention of *Parratt*, *Hudson*, or *Zinermon*.

The Sixth Circuit opinion was issued after the Court's decision in *Saucier v. Katz,* 533 U.S. 194, 201 (2001), but before *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002). The Court should grant this petition so that it can provide guidance on how "unsimilar" a previous case can be and still give "fair warning" that an officer's conduct violates the Constitution. *Hope,* 122 S.Ct. at 2516.

CONCLUSION

For the reasons stated above, the officers respectfully request that the Court issue its writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Paul V. Guagliardo
Counsel of Record
Gregory Scott Gowen
Jefferson County Attorney's Office
601 West Jefferson Street, Room 200
Louisville, Kentucky 40202
(502) 574-3511

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-5088

[Filed December 3, 2002]

NATASHA THOMAS, ET AL., Plaintiffs-Appellees,	)
v.	)
ANN COHEN, ET AL., Defendants-Appellants.	)

BEFORE CLAY, GILMAN, and WALLACE,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

* Hon. J. Clifford Wallace, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-5088

[Filed August 23, 2002]

NATASHA THOMAS; SUSAN GIBBS; and EDWINA LEWIS,
Plaintiffs-Appellees,

v.

ANN COHEN; GLENN CRAIG; JAMES EMBRY; and SUSAN FISCHER, in their individual capacities,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville
No. 99-00719
Charles R. Simpson III, District Judge

Before CLAY, GILMAN, and WALLACE, Circuit Judges.*

* The Honorable J. Clifford Wallace, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION

CLAY, Circuit Judge. Defendants, Ann Cohen, Glenn Craig, James Embry and Susan Fischer, all officers with the Louisville, Kentucky, Police Department, appeal the district court's denial of their motion for summary judgment in this civil rights action filed by Plaintiffs, Natasha Thomas, Susan Gibbs, and Edwina Lewis, former residents of the Augusta House, a "transitional shelter" for women attempting to acclimate themselves to mainstream society. Plaintiffs filed suit seeking monetary damages under 42 U.S.C. § 1983 after Defendants evicted them from the Augusta House without a judicial order, allegedly in violation of Plaintiffs' Fourth and Fourteenth Amendment rights. Defendants claim that they are entitled to summary judgment under the doctrine of qualified immunity. For the reasons that follow, we **AFFIRM** the district court's judgment inasmuch as we hold that Plaintiffs' evictions were effectuated in violation of their Fourteenth Amendment rights. We reject Plaintiffs' arguments that the evictions violate Plaintiffs' Fourth Amendment rights, although Judge Clay would hold that Plaintiffs' Fourth Amendment rights were violated as well.

I. BACKGROUND

The Augusta House is located in Louisville and operated by Mission House, Inc. At all times relevant to this case, Plaintiffs were residents of the Augusta House, retained keys to the premises, and had full rights of entry. The Augusta House charged each resident a monthly fee of $ 140 to live there. Each resident of the Augusta House had her own bedroom, but shared the rest of the house in common. In the fall of 1998, a dispute arose between Plaintiffs and the

Director of the Augusta House, Laura Zinious ("Zinious"), regarding Plaintiffs' alleged violations of the Augusta House rules. Zinious, who did not live on the premises, decided to evict Plaintiffs from the residence for these alleged violations. Meanwhile, Plaintiffs met with Linda Roberts, an attorney at the local Legal Aid Society, who informed them that, in her legal opinion, they were "tenants" of the Augusta House and could not be removed unless Zinious followed Kentucky's forcible detainer (statutory eviction) procedures.[1] Roberts wrote a letter to Zinious stating this opinion. Plaintiffs also obtained a similar letter from the Louisville Tenants Association ("LTA"), a tenant advocacy group. Defendants have conceded for purposes of this appeal that Plaintiffs were tenants of the Augusta House.[2]

In the early evening of Monday, December 7, 1998, an Augusta House employee called the Louisville Police regarding a dispute with Plaintiffs. Officer Larry Cushman

---

[1] Under the Kentucky Uniform Residential Landlord and Tenant Act ("URLTA"), 1989 Ky. Rev. Stat. ("K.R.S.") §§ 383.505 - 383.705 (Banks-Baldwin), "self-help" evictions by landlords are prohibited. K.R.S. §§ 383.615(4); 383.690. Instead, the state provides for written notice prior to termination of a lease, K.R.S. § 383.660, and "forcible detainer" actions by a landlord upon the refusal of a tenant to deliver possession. K.R.S. §§ 383.200; 383.615(4).

[2] The URLTA defines a "tenant" as "a person entitled under a rental agreement to occupy a dwelling to the exclusion of others." K.R.S. § 383.545(15). A "rental agreement" is defined as any agreement "written or oral, and valid rules and regulations . . . embodying the terms and conditions concerning the use and occupancy of a dwelling and premises." K.R.S. § 383.545(11).

("Cushman") responded to the call. When Cushman arrived at the scene, he was asked to remove Plaintiffs from the residence. No court order had been obtained authorizing an eviction. Based upon information supplied to him by Plaintiffs, as well as his own independent observations, Cushman declined to remove Plaintiffs from the residence. Cushman then advised the complainant to seek redress through proper legal channels by filing eviction papers.[3]

---

[3] In his deposition, Cushman stated his reasons for not forcing Plaintiffs to leave:

> Upon arriving at the scene, I informed dispatch I was there and the individual was outside and I met him outside. He said he had, I believe, three subjects inside that needed to be evicted. I asked him if he had proper documentation, which he showed me a piece of paper, and I can't recall exactly what it looks like, or what it said at the point in time. But at the point in time I looked at it, it gave me no legal parameters to do anything, so I had him wait. I went up and knocked on the door, went inside, and talked to three females. They were upset, said that he was trying to put them out. And I can't recall exactly what they said, but I believe that they were being accused of theft, or something. And I asked them if they had been served an eviction notice, a ten-day notice, or anything like that, and I believe they informed me at that point in time they had not. And, basically, I didn't see any illegal doings going on in my presence. I felt there was not much I could do. I gave them some basic information, that if they felt that they were being falsely accused or put out, that

Officer Cushman is not a party to this action.

The following morning, Zinious called the police to have Plaintiffs removed. This time, the Defendant officers responded to the call. They had no knowledge of Officer Cushman's prior interaction with Plaintiffs. When the officers arrived at the residence, Zinious told them that Plaintiffs had violated the rules of the shelter by possessing alcohol and illegal drugs on the premises. She also told them that

---

> they should call the Louisville Landlord/Tenants Association. And I went back outside, and I told the individual out there that I had no legal - I felt at that point in time I had no legal right to put them out on the street and refused to do so.
>
> . . .
>
> I didn't have any legal papers in front of me signed by a judge, no eviction papers signed by, you know, the courts or the system downtown. It looked like a residence to me. The room I was standing in looked like a living room. There was furniture there . . . . I didn't see any sign of disorderly conduct. They weren't looking like they were going to hurt themselves or anybody else. Looked like they had established residency. I asked them if they had all their personal belongings there, had all their clothing and personal effects and everything. They were telling me that they were living there. And I felt that there was nothing under the law at that point in time that I could do to either arrest them or put them out on the street.

(J.A. at 267-270.)

Plaintiffs threatened other Augusta House residents and that they refused to leave despite her orders to do so. Zinious then told the officers that eviction was "standard procedure" under the circumstances and asked them to remove Plaintiffs from the residence. She never produced a court order or other documentation authorizing the eviction.

Plaintiffs claim that the officers then entered their rooms and announced that they would have to leave the premises immediately. Plaintiffs informed the officers that they paid monthly rent to the Augusta House and showed or offered to show them the letter from the LTA. The officers disregarded Plaintiffs' attempts to provide explanations and documentation supporting their legal right to reside at the premises and proceeded to evict them without the benefit of a court order. At some point, one Plaintiff attempted to call attorney Roberts to tell her that the police were evicting Plaintiffs, but an officer ordered her to leave, laughed at her, and told her that she was homeless and did not have a lawyer. There was no physical confrontation during the eviction, and none of Plaintiffs' personal property was destroyed. However, Plaintiffs were not able to retrieve all of their belongings prior to the eviction. The officers do not claim that an emergency or exigent circumstances existed at the time to justify the eviction.

Plaintiffs subsequently filed suit against the officers, seeking monetary damages against them in their individual capacities under 42 U.S.C. § 1983 for violating Plaintiffs' Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right not to be deprived of possessory interests in property without due

process.[4] Defendants filed a motion for summary judgment invoking the doctrine of qualified immunity. The district court denied this motion, and Defendants filed a timely appeal.

II. JURISDICTION AND STANDARD OF REVIEW

Before turning to the merits of the case, we must first address Plaintiffs' contention that this appeal should be dismissed because we lack jurisdiction to review the district court's denial of summary judgment. Defendants' appeal focuses solely on the district court's determination that they are not entitled to qualified immunity. Generally, denials of summary judgment on the basis of qualified immunity are "collateral orders" that are immediately appealable to the extent that they present issues of law separable from the merits yet potentially determinative of a claim. *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999); *Berryman v. Rieger*, 150 F.3d 561, 562 (6th Cir. 1998). The Supreme Court has explained that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." *Mitchell v. Forsyth*, 472 U.S. 511, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985). Thus, while we "cannot review on interlocutory appeal a district court's determination that a genuine issue of fact exists for trial, . . . we retain jurisdiction over the legal question of qualified immunity, i.e., whether a given set of facts violates clearly established law." *Mattox*, 183 F.3d at 519 (citations

---

[4] Plaintiffs also filed suit against Mission House, Inc., seeking a temporary injunction and restraining order under the Kentucky Landlord-Tenant Act. This action was later dismissed after the parties settled the case on December 11, 1998.

omitted). As a purely legal determination, the district court's denial of qualified immunity is subject to *de novo* review. *Id.*[5]

III. ANALYSIS

To state a claim under 42 U.S.C. § 1983, a plaintiff must prove that the defendant, while acting under color of state law, deprived her of a right secured by the Constitution or laws of the United States. *Gomez v. Toledo*, 446 U.S. 635, 640, 64 L. Ed. 2d 572, 100 S. Ct. 1920 (1980). "[A] government official's discretionary abuse of power which goes beyond the scope of his or her authority will usually have been performed under color of state law for purposes of section 1983 liability." *Cassady v. Tackett*, 938 F.2d 693, 700 (6th Cir. 1991) (Engle, J., concurring in part and dissenting in part).

---

[5] In reviewing whether Defendants are entitled to qualified immunity, we take the facts in the light most favorable to Plaintiffs. *See Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). In determining that Defendants are entitled to qualified immunity on Plaintiffs' Fourth and Fourteenth Amendment claims, Judge Wallace in his dissenting opinion inappropriately construes the facts in the light most favorable to Defendants. Contrary to the assertion in Judge Wallace's opinion that Plaintiffs did not dispute Defendants' testimony that Plaintiffs' behavior inside Augusta House prevented any communication, the deposition testimony in the record clearly indicates that Plaintiffs disputed Defendants' version of the events in question.

A. The Doctrine of Qualified Immunity

The doctrine of qualified immunity generally shields state actors from liability under § 1983 based on their discretionary acts. *Anderson v. Creighton*, 483 U.S. 635, 638-640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Daugherty v. Campbell*, 935 F.2d 780, 783-84 (6th Cir. 1991). As noted by this Court in *Daugherty*, "qualified immunity entitles its possessor to '*immunity from suit* rather than a mere defense to liability.'" *Id.* at 783 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (emphasis in original). Thus, government actors, including police officers, have the freedom to perform their official duties without fear that even a slight misstep will trigger their financial ruin. *Wyatt v. Cole*, 504 U.S. 158, 167, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992). However, government actors may lose this immunity when they violate clearly established constitutional rights of which a reasonable person should have known. Anderson, 483 U.S. at 638-39; *Harlow*, 457 U.S. at 818. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819).

Plaintiffs bear the burden of defeating this immunity, which is a legal issue to be decided by the court. *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). First, Plaintiffs must show that Defendants deprived them of a right protected by the Constitution. Second, this right must be so clearly established that a reasonable officer would understand

that his or her actions would violate that right. *Harlow*, 457 U.S. at 818-19; *Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000). As stated by the Supreme Court in *Anderson*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citation omitted); *see also Daugherty*, 935 F.2d at 784.

In the instant case, the district court determined that Defendants violated two of Plaintiffs' explicit constitutional rights: their Fourth Amendment right to be free from unreasonable seizures and their Fourteenth Amendment right to be afforded due process of law. On appeal, Defendants claim that they were entitled to qualified immunity because their involvement in a "garden-variety" landlord-tenant dispute cannot constitute a violation of the Fourth Amendment. Defendants further contend that inasmuch as they were not authorized to conduct a predeprivation hearing under Kentucky law, and because adequate postdeprivation remedies were in place, their actions cannot amount to a violation of the Fourteenth Amendment's Due Process Clause. Finally, Defendants claim that even if Plaintiffs' constitutional rights were violated, those rights were not so clearly

established that reasonable officers would have known that they were violating them.

B. Deprivation of Fourth Amendment Rights

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. This right applies with equal force in both the civil and criminal contexts. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 539, 18 L. Ed. 2d 930, 87 S. Ct. 1727 (1967). In *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (1984), the Supreme Court explained that the first clause of the Fourth Amendment "protects two types of expectations, one involving searches, the other seizures." According to *Jacobsen*, a search occurs when an expectation of privacy that society is prepared to consider is infringed, whereas a seizure of property occurs when "there is some meaningful interference with an individual's possessory interests in that property." *Id.* In *Jacobsen,* the Court further explained: "While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment -- meaningful interference, however brief, with an individual's freedom of movement." *Id.* at 114 n 5. This expansive definition is necessary because a seizure threatens an individual's distinct interest in retaining possession of his or her property. *See Texas v. Brown*, 460 U.S. 730, 747-48, 75 L. Ed. 2d 502, 103 S. Ct. 1535 (1983) (Stevens, J., concurring).

1. *Soldal v. Cook County, Illinois*, 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992)

The Supreme Court has also recognized that the participation of a police officer in an improper eviction constitutes a seizure in violation of the Fourth Amendment. The controlling case in this regard is *Soldal v. Cook County, Illinois*, 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992), where the Supreme Court, reversing an *en banc* opinion written by Judge Posner of the Seventh Circuit, addressed whether mobile home owners had their mobile home seized within the meaning of the Fourth Amendment when deputy sheriffs assisted the owner and manager of the trailer park in physically tearing the mobile home from its foundation and towing it to another lot. As the Court noted in *Soldal*, the Seventh Circuit, while acknowledging that there was a "'seizure' in the literal sense," found no Fourth Amendment violation "because it was not made in the course of public law enforcement and because it did not invade the Soldals' privacy." *Id.* at 60. In *Soldal*, the U.S. Supreme Court remarked on the reasoning of the Seventh Circuit as follows:

> This conclusion followed from a narrow reading of the Amendment, which the court construed to safeguard only privacy and liberty interests while leaving unprotected possessory interests where neither privacy nor liberty was at stake. Otherwise, the court said,
>
> "a constitutional provision enacted two centuries ago [would] make every repossession and eviction with police assistance actionable

> under -- of all things - the Fourth Amendment[, which] would trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests."
>
> Because the officers had not entered Soldal's house, rummaged through his possessions, or, in the Court of Appeals' view, interfered with his liberty in the course of the eviction, the Fourth Amendment offered no protection against the "grave deprivation" of property that had occurred.

Soldal, 506 U.S. at 60 (citations omitted).

In rejecting the Seventh Circuit's interpretation of the Fourth Amendment, the Supreme Court held that "the Amendment protects property as well as privacy." *Id.* Responding to the argument that, after *Katz v. United States*, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967), *Warden v. Hayden*, 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 (1967) and *Cardwell v. Lewis*, 417 U.S. 583, 41 L. Ed. 2d 325, 94 S. Ct. 2464, 69 Ohio Op. 2d 69 (1974), "the Fourth Amendment is only marginally concerned with property rights," the Court stated that "the message of those cases is that property rights are not the sole measure of Fourth

Amendment violations." *Soldal*, 506 U.S. at 64.[6] Moreover, the Court rejected the claim that "any of the Court's prior cases supports the view that the Fourth Amendment protects against unreasonable seizures of property only where privacy or liberty is also implicated." *Id.* at 65. The Court also rejected the view that the Fourth Amendment protects only against seizures that are the outcome of a search, holding that "seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." *Id.* at 68. Putting forth a rather expansive interpretation of the Fourth Amendment, the Court in *Soldal* declared that its purpose was to protect the people from governmental interference:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the

---

[6] As various commentators have pointed out, early in the last century, the Supreme Court, relying upon Lord Camden's opinion in the 1765 case of *Entick v. Carrington, 19 Howell s State Trials 1029*, 95 Eng. Rep. 807 (C.P. 1765) (finding invalid the seizure of private papers pursuant to a general warrant), analyzed Fourth Amendment cases through the prism of property rights, culminating in the case of *Olmstead v. United States*, 277 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928), which held that the Fourth Amendment does not protect a homeowner against wiretaps of phone conversations provided that there was no trespass of the homeowner's property. *Hayden* and *Katz* changed course, holding that privacy, not property, was the organizing principle of Fourth Amendment analysis. Thus, *Soldal* must be understood against this backdrop of the Court's Fourth Amendment jurisprudence during the last century.

> Amendment applies. *What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to . . . effect an eviction by the police . . . .*

Id. at 69 (emphasis added).

Applying this broad interpretation of the Fourth Amendment, the Court found that the action that "dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot" implicated the interests of the Fourth Amendment. In reaching this conclusion, the Court rejected the Seventh Circuit's view that because "the Soldals' claim was more akin to a challenge against the deprivation of property without due process of law than against an unreasonable seizure . . . they should not be allowed to bring their suit under the guise of the Fourth Amendment." *Id.* at 70. Rather, the Court, citing *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), found "no basis for doling out constitutional protections in such fashion" and that "certain wrongs affect more than a single right and accordingly, can implicate more than one of the Constitution's commands." *Soldal*, 506 U.S. at 70.[7] The Court also found exaggerated the concern that its

---

[7] About one year after *Soldal*, this point was developed by the Court in *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993), where it held that before the seizure of real property the homeowner was entitled to notice and an opportunity to be heard under the Due Process

expanded interpretation of the Fourth Amendment would federalize "areas of law traditionally the concern of the States." *Id.* at 71. Noting that "'reasonableness is still the ultimate standard' under the Fourth Amendment," the Court observed that "had the ejection in this case properly awaited the state court's judgment it is quite unlikely that the federal court would have been bothered with a § 1983 action alleging a Fourth Amendment violation." *Id.* Accordingly, the Court believed that "reaffirmance of Fourth Amendment principles should not foment a wave of new litigation in the federal courts." *Id.* at 72.

2. Plaintiffs were deprived of clearly established rights under the Fourth Amendment

The question before us is whether the Supreme Court in *Jacobsen* and *Soldal* clearly established that a "seizure" of property within the meaning of the Fourth Amendment occurs when governmental agents enforce an illegal eviction by forcing a tenant to vacate his or her residence, but otherwise do not assist in physically taking over or moving the premises? When a governmental agent carries out an eviction without a court order and in the absence of any colorable legal authority, this question must be answered affirmatively. As the Court stated in *Jacobsen*, there is "some meaningful interference" with a tenant's possessory interest in his or her property, "however brief," when a governmental agent removes a tenant from his or her residence, whether a home or apartment. *Soldal* reiterated this point. Simply put, *Soldal*

Clause.

does not require that the "meaningful interference" by governmental agents actually involve the physical seizure of the property in question; rather, to constitute a seizure of property within the meaning of the Fourth Amendment, it is enough that the governmental agent's action amounted to "meaningful interference with an individual's possessory interests in that property." *Jacobsen*, 466 U.S. at 113. Escorting tenants from their residences in the course of effectuating an eviction, as in this case, satisfies the requirement of "meaningful interference" with their leasehold interest so as to amount to a seizure of their property. In this regard, the lack of physical force is not terribly germane inasmuch as the police effectuated the eviction by the very apparent and not too subtle threat of physical force and dire legal consequences should the tenants not comply with the officers' instructions to vacate the property. Under the facts of this case, Plaintiffs therefore had a clearly established right to be free from such unconstitutional seizures. *Haverstick Enters., Inc. v. Fin. Credit, Inc.*, 32 F.3d 989, 994 (6th Cir. 1994).

Defendants attempt to distinguish the instant case from *Soldal* by arguing that they only helped to resolve a "garden-variety" landlord-tenant dispute, which would not constitute a seizure. However, Defendants have cited out of context the following language in the conclusion to Justice White's opinion in *Soldal*:

> The complaint here alleges that respondents, acting under color of state law, dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot. Taking these allegations as true,

> this was no "garden-variety" landlord-tenant or commercial dispute. The facts alleged suffice to constitute a "seizure" within the meaning of the Fourth Amendment, for they plainly implicate the interests protected by that provision.

506 U.S. at 72. This closing passage is merely intended to highlight the egregious violation in that case; it does not stand for the proposition that an act must embody physical displacement of property in order to constitute a seizure within the meaning of the Fourth Amendment. As we have previously recognized,

> while the [*Soldal*] Court was not creating new substantive Fourth Amendment law, it stated in no uncertain terms that the right against unreasonable seizures is "transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, *effect an eviction by the police*, or on a whim, for no reason at all."

Flatford v. City of Monroe, 17 F.3d 162, 170 n.8 (6th Cir. 1994) (emphasis added) (quoting *Soldal*, 506 U.S. at 69). Thus, it is apparent that the Supreme Court foresaw a spectrum of potential deprivations of possessory interests in property.

Moreover, the method of interference need not be factually on all fours with *Soldal* in order for a seizure to

have occurred.[8] As the *Anderson* Court made clear, it is not necessary that "the very action in question has been previously held unlawful. " 483 U.S. at 640. Rather, what is required is only that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

Forcible eviction of tenants, even if in a more peaceful or traditional manner than in *Soldal*, is by its very nature a meaningful interference with their possessory interests and is therefore no less a deprivation of their constitutional rights when carried out by law enforcement officers in the absence of a legal basis for doing so. The *Soldal* Court emphasized that "'at the very core' of the Fourth Amendment 'stands the right of a [person] to retreat into [her] own home,'" *id.* at 61 (quoting *Silverman v. United States*, 365 U.S. 505, 511, 5 L. Ed. 2d 734, 81 S. Ct. 679 (1961)), thereby giving us every reason to regard the deprivation of Plaintiffs' possessory interests in their residence as a violation of the Fourth Amendment. To hold otherwise in the context now presented would constitute a departure from precedent. Indeed, we have

---

[8] It should be noted that this analysis is not in tension with our decision in *Fox v. Van Oosterum*, 176 F.3d 342, 351 (6th Cir. 1999), in which we noted that "the Supreme Court has only applied the 'meaningful interference with possessory interests' definition of seizure to cases where there is no debate that the challenged act is one of taking property away from an individual . . . ." In that case, a plaintiff alleged a Fourth Amendment violation due to police officers' unwarranted retention of his driver's license after an initially lawful seizure. Unlike the confiscation of the license in *Fox*, the eviction in the case at bar was never sanctioned under the law.

previously found that mere damage to property inside a home may constitute a meaningful interference with possessory rights. *See, e.g., Bonds v. Cox*, 20 F.3d 697, 701-02 (6th Cir. 1994) (holding that, under *Soldal*, damage to a house, including broken doors, mutilated vinyl siding, broken desks, and holes in walls, rises to the level of "meaningful interference" with one's possessory interests).

Finally, the seizure of Plaintiffs' possessory interest in their residence implicates the interests of privacy, security and liberty underlying the Fourth Amendment. *See* Thomas K. Clancy, *What Does The Fourth Amendment Protect: Property, Privacy, or Security*, 33 Wake Forest L. Rev 307 (1998); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 Stan. L. Rev. 555 (1996); William C. Heffernan, *Property, Privacy, and The Fourth Amendment*, 60 Brook. L. Rev. 633 (1994). First, a tenant has a privacy interest at stake in his or her leasehold. As the Court has stated, the legitimation of expectations of privacy must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society. *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978). Because the right to exclude others is one of the main rights attaching to property, tenants in lawful possession of a home or apartment generally have a legitimate expectation of privacy by virtue of having a property interest in a specific piece of real estate.[9] Further, tenants, like all people, enjoy

---

[9] As pointed out by the Supreme Court in *Oliver v. United States*, 466 U.S. 170, 178, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984),

the Fourth Amendment "right . . . to be secure in their . . . houses." The personal security of tenants is thus threatened when they cannot control their possessions free from unreasonable governmental inference, whether or not these possessions are characterized as real or personal property. Finally, the liberty interest of tenants in controlling their possessions and in being left alone in their own homes would be severely compromised if people were not free from unreasonable governmental interference.

Therefore, assuming that Plaintiffs in the instant case were residents of the Augusta House, it is clear that their possessory interests in their place of residence were meaningfully interfered with when the officers deprived Plaintiffs of their place of residence, thus effectuating a seizure within the meaning of the Fourth Amendment.

3. The seizure was objectively unreasonable

However, this finding does not end our inquiry. In order to be actionable, a seizure must also be objectively unreasonable. *See Soldal*, 506 U.S. at 71 (noting that "'reasonableness is still the ultimate standard' under the Fourth Amendment") (quoting *Camara*, 387 U.S. at 539). A determination of reasonableness requires a "careful balancing

---

quoting from *Payton v. New York*, 445 U.S. 573, 601, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980): "The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" 466 U.S. at 178.

of governmental and private interests." *Soldal*, 506 U.S. at 71 (citing New Jersey v. T.L.O., 469 U.S. 325, 341, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985)). Under this standard, most eviction-type seizures will not be found unconstitutional. *Soldal*, 506 U.S. at 71. But upon reviewing the series of events that transpired in the case at bar, we find that Defendants' actions cannot be deemed "objectively reasonable." Instead, it seems that the officers executed a seizure "in the absence of objectively reasonable grounds for doing so." *Id.* at 72.

Zinious, the Augusta House director, called the police to the scene complaining of problems with Plaintiffs. She told the officers that the Augusta House was a transitional shelter and that Plaintiffs were residents at the shelter who did not pay rent. She also claimed that Plaintiffs had violated the Augusta House rules by possessing contraband and physically threatening other residents. Zinious further represented that she had asked Plaintiffs to leave for the previous two weeks but that they had refused to do so and that an eviction under these circumstances was "standard procedure." Defendants claim that it was reasonable for them to rely on Zinious' representations and carry out the eviction. But this assertion is implausible. The officers did not undertake any effort to determine whether Plaintiffs were indeed residents who paid rent and had a right to be on the premises. They never asked Zinious if she had any legal authority to evict Plaintiffs and they knew that she did not have a court order. Despite efforts by at least one Plaintiff to provide documentation supporting their legal right to reside at the Augusta House, the officers ignored Plaintiffs' pleas and escorted them from the premises.

The Supreme Court recognized in *Soldal* that a showing of unreasonableness where officers act pursuant to a judicial order "would be a laborious task indeed." 506 U.S. at 71. In addition, we have previously held that a police officer's mere presence as a "civil standby" to observe and maintain the peace at a lawful statutory repossession entitles a defendant to qualified immunity. *Haverstick Enterprises, Inc. v. Financial Credit, Inc.*, 32 F.3d 989 (6th Cir. 1994); *see also Apostol v. Landau*, 957 F.2d 339 (7th Cir. 1992); *but cf. Quinones v. Tentler*, No. 00- C-5294, 2001 U.S. Dist. LEXIS 23908 (N.D. Ill. 2001) (holding that police officers who threatened a tenant with arrest at the request of an evicting landlord had perpetrated a "seizure" of property in violation of the Fourth Amendment). However, in the instant case, Defendants' involvement was neither brief nor passive; rather, they actively participated in the illegal seizure. The officers acted without a warrant or other court order legitimating their conduct and blindly carried out Zinious' wishes by forcing Plaintiffs to leave their place of residence. *See Open Inns, Ltd. v. Chester County Sheriff's Dep't*, 24 F. Supp. 2d 410 (E.D. Pa. 1998). In addition, Defendants admit that the local sheriff's department, not Louisville police officers, are charged with the task of enforcing judicial eviction orders. Furthermore, Defendants do not claim that exigent circumstances existed that would have justified the eviction. At any rate, despite Zinious' allegations of physical threats, there is no evidence that Plaintiffs posed an immediate harm to themselves or to others such as would warrant their removal from the premises. *Cf. Flatford*, 17 F.3d at 170-71 (holding that police officers who assisted in evicting tenants were entitled to qualified immunity because they reasonably presumed the validity of a building

inspector's determination that exigent circumstances existed which posed a danger to tenants).

From the standpoint of "objective legal reasonableness," then, Defendants are not entitled to the protection of qualified immunity providing them with immunity from this lawsuit. *See Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 819). Here, Defendants were informed that Plaintiffs were legal residents of the house, having keys to the premises and paying rent for their individual rooms. Further, Defendants were provided with documentation establishing that Plaintiffs were tenants under Kentucky law. Defendants also knew or should have known that a court order is needed to perform an eviction. Further, Defendants were aware that the Sheriff's Department, not the police, carried out court-ordered evictions in Louisville. Moreover, there were no emergency or exigent circumstances. Based upon the foregoing facts, Defendants could not have had a reasonable belief that they could legally evict Plaintiffs from the Augusta House.

Finally, a balancing of the governmental and private interests at stake makes the unreasonableness of the seizure plain. I agree with the district court that, absent a court order or exigency, the government's interest in evicting Plaintiffs from their home was "minimal at best," especially in comparison to Plaintiffs' private interest in retaining possessory rights to their place of residence. The officers therefore subjected Plaintiffs to an unreasonable seizure in deprivation of their Fourth Amendment rights.

C. Deprivation of Fourteenth Amendment Rights

Defendants also dispute the district court's holding that the non-judicial eviction constituted a denial of Plaintiffs' rights to procedural due process under the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment guarantees that "no State shall deprive . . . any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. Procedural due process claims are examined under a two-part analysis. First, the court must determine whether the interest at stake is a protected liberty or property right under the Fourteenth Amendment. Only after identifying such a right do we continue to consider whether the deprivation of that interest contravened notions of due process. *See Bd. of Regents v. Roth*, 408 U.S. 564, 570-71, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Ferencz v. Hairston*, 119 F.3d 1244, 1247 (6th Cir. 1997); *Tony L. v. Childers*, 71 F.3d 1182 (6th Cir. 1995). Property interests are not created by the Constitution. *Cleveland v. Bd. of Educ. of Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Instead, they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Roth*, 408 U.S. at 577; *see also Verba v. Ohio Cas. Ins. Co.*, 851 F.2d 811, 813 (6th Cir. 1988). Under Kentucky law, tenants holding leasehold estates have a recognized property interest. *See* K.R.S. § 383.590. Thus, Plaintiffs have a recognized property interest for Fourteenth Amendment purposes.

1. Due process demands predeprivation process

It is well-established that possessory interests in property invoke procedural due process protections. *See Fuentes v. Shevin*, 407 U.S. 67, 87, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). Due process generally requires notice and a hearing prior to eviction.[10] *Id.* at 82; *Leary v. Daeschner*, 228 F.3d 729, 742 (6th Cir. 2001) ("When a plaintiff has a protected property interest, a predeprivation hearing of some sort is generally required to satisfy the dictates of due process."); *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 126 L. Ed. 2d 490, 114 S. Ct. 492 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process.").

---

[10] As the Fourth Circuit stated,due process in the eviction context requires the following:

> (1) timely and adequate notice detailing reasons for proposed termination, (2) an opportunity on part of tenant to confront and cross-examine adverse witnesses, (3) right of tenant to be represented by counsel provided by him to delineate issues, present factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interest, (4) a decision, based on evidence adduced at hearing, in which reasons for decision and evidence relied on are set forth, and (5) an impartial decision maker.

Caulder v. Durham Hous. Auth., 433 F.2d 998, 1004 (4th Cir. 1970) (citing *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970)).

The Supreme Court has recognized, however, that "extraordinary situations," where a valid governmental interest exists, may justify postponement of such a hearing until after eviction. *Fuentes*, 407 U.S. at 80-81. "A prior hearing is not constitutionally required where there is a special need for very prompt action to secure an important public interest and where a governmental official is responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance." *Flatford*, 17 F.3d at 167 (citing *Fuentes*, 407 U.S. at 91). In *Flatford*, we rejected a due process claim alleging a lack of predeprivation process in connection with the emergency evacuation of tenants. We held that, although an emergency eviction from one's home is a significant intrusion, "where the need to protect lives is the basis for such an intrusion, government officials should not be made to hesitate in performing their duties, particularly where postdeprivation remedies can immediately correct any errors in judgment." *Flatford*, 17 F.3d at 168. However, we emphasized that tenants are generally "entitled to pre-eviction judicial oversight in the absence of emergency circumstances." *Id.* at 170.

In the case at bar, Defendants have neither claimed, nor have they pointed to any evidence that would tend to prove, that exigent circumstances existed to justify Plaintiffs' eviction. Yet, the officers "unceremoniously dispossessed" Plaintiffs of their place of residence without affording them an opportunity to be heard at any type of predeprivation hearing. *Soldal*, 506 U.S. at 62. "It is extraordinary here that the plaintiffs were put to such an indignity utterly without cause or reason, and Defendants have not even attempted to suggest a governmental or private interest amounting to 'exigent

circumstances.'" *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 619-20 (D. Md. 1998). Thus, it seems that Plaintiffs' rights to procedural due process have been violated. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1307 (4th Cir 1992) (holding that, "absent exigent circumstances, no-notice evictions violate due process"). However, Defendants dispute this result for several reasons, each of which we find meritless.

Defendants contend that *Good Real Prop.* and *Flatford* are inapplicable to the instant case because in those cases, the government was attempting to assert its own interest in property via civil forfeiture and condemnation proceedings, while in the instant case the shelter manager was asserting the shelter's right to control its property. Yet, they cite no reason why this Court should analyze the instant context any differently. Defendants also argue that, as government actors, they were neither bound by Kentucky's prohibition on self-help evictions, nor were they authorized under that statute to resolve the dispute through predeprivation judicial process. However, this does not mean that the officers could have done through means of government authority what Laura Zinious could not have done absent a judicial eviction order. Officers should at least be expected to refrain from actively participating in breaking the law. *See Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998) (holding that a plaintiff had a valid procedural due process claim under similar circumstances).

2. Contemporaneous constitutional claims are permissible

Defendants also claim that Plaintiffs' claims should not be considered under the Fourteenth Amendment Due Process Clause, and that our attention should be focused on what Defendants term the more specific Fourth Amendment standards. Defendants argue that they merely exercised a type of discretion akin to a determination of probable cause and not a decision to interfere with Plaintiffs' possessory interests in property. They note that had Plaintiffs been arrested for trespass, the issue for consideration would be whether there was probable cause to effectuate such an arrest. Therefore, they contend that only Plaintiffs' rights against an unreasonable seizure are implicated. We find no merit to this argument.

The Supreme Court has rejected the notion that the applicability of one constitutional amendment preempts the guarantees of another. *Good Real Prop.*, 510 U.S. at 49. In *Soldal*, the Supreme Court recognized that "certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn." *Soldal*, 506 U.S. at 70; *Bonds*, 20 F.3d at 702.

As both the district court and Plaintiffs correctly note, Defendants seem to misconstrue the distinction between procedural and substantive due process analyses. While procedural due process ensures that citizens have procedural safeguards prior to deprivation of rights, substantive due

process limits the impingement of certain fundamental rights regardless of process. *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000). Courts generally favor analyses of allegedly unconstitutional governmental acts under a specific textual right rather than under the amorphous substantive due process standard. *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989); *accord Thaddeus-X v. Blatter*, 175 F.3d 378, 388 (6th Cir. 1999). However, because the seizure in the case at bar implicates two explicit textual sources of constitutional protection, the Fourth and Fourteenth Amendments, "the proper question is not which Amendment controls but whether either Amendment [has been] violated." *Good Real Prop.*, 510 U.S. at 50.

Defendants do not dispute that Plaintiffs, presumed to be tenants, have rights recognized by state law. Yet, they claim that under this Court's opinion in *Pyles v. Raisor*, 60 F.3d 1211 (6th Cir. 1995), "a violation of a right conferred by state law, which is not grounded in the federal constitution, does not, by itself, state a claim under 42 U.S.C. § 1983." Defendants' Br. at 18. However, *Pyles* is totally inapposite. In that case we held that an arrestee could not recover under § 1983 for an arrest which violated Kentucky law, but which was supported by probable cause, because such an arrest did not implicate any federal constitutional right. But, inasmuch as an interference with Plaintiffs' state-recognized leasehold property interests constitutes a violation of their rights to procedural due process and freedom from

unreasonable seizures, a federal constitutional right is clearly implicated in the instant case.[11]

3. Postdeprivation remedies are inadequate

Defendants further contend that the existence of postdeprivation remedies for eviction under Kentucky law satisfies the requirements of due process and a lack of predeprivation process is therefore not violative of the Fourteenth Amendment. In support of this argument, Defendants point to the Eighth Circuit's decision in *Reese v. Kennedy*, 865 F.2d 186 (8th Cir. 1989). In *Reese*, an unmarried couple shared a home for two years. The couple shared bills, but the deed to the house was in the male defendant's name, and he made the mortgage payments. At some point, Reese, his female companion, agreed to move out as soon as she was financially able. But before she could do so, the defendant, who was out of town at the time, called police officers to remove her from the home. Two officers spoke to the couple's neighbors and then asked Reese to leave. The officers prevented her from retrieving any of her belongings. Reese filed a § 1983 action against the officers and others. The district court rejected Reese's procedural due

---

[11] Essentially, Defendants are recycling the argument that they are legally incapable of violating the URLTA because the statute's purpose is to govern the rights and responsibilities of landlords and tenants, not third parties. K.R.S. § 383.505. However, as the district court aptly noted, Plaintiffs have not alleged that the officers themselves violated the URLTA; rather, Plaintiffs merely point to the URLTA as evidence of the process which was due prior to eviction. Even if Defendants did not violate URLTA, their actions may have still violated the Fourteenth Amendment.

process claim and the court of appeals affirmed, holding that because the state provided adequate postdeprivation remedies for wrongful eviction, no due process violation had occurred. *Reese*, 865 F.2d at 187.

On appeal, Defendants rely upon *Reese* for the proposition that a § 1983 action may not lie under a procedural due process theory. Needless to say, we are not bound by a decision from another circuit. *See In re Ann Arbor R.R. Co.*, 623 F.2d 480, 482 (6th Cir. 1980). In addition, subsequent cases lead us to a different conclusion than the one Defendants advocate. First, *Reese* was decided prior to *Soldal*, *Good Real Prop.* and *Flatford*. Its continuing relevance is therefore doubtful. Furthermore, in deciding *Reese*, the Eighth Circuit relied upon an outdated interpretation of the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In *Parratt*, a prisoner sued a state employee who negligently lost materials the prisoner had ordered by mail. Although finding that the prisoner had suffered a deprivation of property interests within the meaning of the Fourteenth Amendment, the Supreme Court held that all the process due for such "random" and "unauthorized" conduct was provided under state tort law. In *Reese*, the Eighth Circuit held that an extrajudicial police eviction was the type of random conduct at issue in *Parratt*. However, this reading of *Parratt* has since been called into question. In *Zinermon v. Burch*, 494 U.S. 113, 136, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990), the Supreme Court declined to extend the "random" and "unauthorized" conduct standard to situations where a deprivation of rights is predictable. Instead, the Court recognized that *Parratt* presented "a special case . . . in which postdeprivation tort remedies are all the process that is

due, simply because they are the only remedies the State could be expected to provide."

Based upon the reasoning in *Zinermon*, we recognized in *Flatford* that a citizen has no cause of action under § 1983 for due process violations "where state tort law furnishes all appropriate process, or where the deprivation cannot be predicted." *Flatford*, 17 F.3d at 168. However, we determined in that case that "postdeprivation state tort remedies are neither timely nor sufficiently remedial for emergency evacuees" because "fundamental fairness expects more than mere tort remedies where [the] government dispossesses its citizens from their homes." *Id. at 169.* It would therefore stand to reason that state tort remedies are likewise insufficient in situations where, as here, there is no emergency.

To be sure, in *Flatford* we did not require predeprivation process; rather we held that the state was required to provide an immediate and meaningful postdeprivation administrative process, including notice of the right to an administrative hearing and direction as to the procedure for administrative review. However, we reached this result only because the existence of exigent circumstances made predeprivation process impractical. Our holding was based upon the rationale that "*emergency* evacuations . . . are not so rare that city officials cannot prepare for advising emergency evacuees of their right to an administrative hearing as similarly provided to landlords." *Id.* at 168 (emphasis added). Conversely, in the instant case no exigent circumstances were present. Furthermore, Kentucky law provides for judicial predeprivation process prior to evictions. Therefore, the instant case is factually distinguishable from

situations such as those in *Parratt* in which the deprivation is unpredictable and predeprivation process is impractical.

The Supreme Court has recognized that the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance." *Good Real Prop.*, 510 U.S. at 44. The government's interest in enforcing a landlord's unauthorized directives pales in comparison to the importance of Plaintiffs' interest in maintaining possessory rights to their place of residence. Therefore, postdeprivation remedies of any sort would be inadequate. Instead, we believe that "given the magnitude of the indignity and the loss of personalty attendant to an eviction without notice, it is indisputable that Plaintiffs are entitled to insist upon a genuine effort to provide notice having a substantial degree of effectiveness at a meaningful time prior to eviction." *Sallie*, 998 F. Supp. at 620.

D. Qualified Immunity

We must also decide whether, in light of clearly established law applicable on the date of the eviction, a reasonable officer would have believed that Defendants' conduct deprived Plaintiffs of their Fourth and Fourteenth Amendment rights. "When conducting an inquiry to determine whether a constitutional right is clearly established, the law of our Circuit requires us to look first to decisions of the Supreme Court, then to decisions of this Court and other courts within our Circuit, and finally to decisions of other circuits." *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991) (citations and quotation marks omitted). The standard for qualified immunity "depends substantially upon

the level of generality at which the relevant 'legal rule' is to be identified . . . ." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639-40, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)) (quotation marks omitted). Thus, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Russo*, 953 F.2d at 1042. Although it need not be the case that "the very action in question has previously been held unlawful . . . in the light of pre-existing law the unlawfulness must be apparent." *Id.* Immunity applies if reasonable officials could disagree as to whether the conduct violated the plaintiff's rights. *McCloud v. Testa*, 97 F.3d 1536, 1553 (6th Cir. 1996). However, the doctrine offers no protection to "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986).

We do not believe that Defendants are entitled to qualified immunity with respect to Plaintiffs' procedural due process claim. The Supreme Court had decided *Fuentes* and *Good Real Prop.* long before Plaintiff's eviction. As we stated in *Flatford*, "it was sufficiently clear at the time of the eviction that [Plaintiffs] were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." *Flatford*, 17 F.3d at 170. Furthermore, Kentucky laws forbidding self-help evictions without judicial process and providing for preeviction notice and forcible detainer actions were well-established. As trained police officers, Defendants should have known that self-help evictions are prohibited in the state of Kentucky, and that the eviction they facilitated was therefore "patently unlawful." *Cofield v. Randolph County Comm'n*, 90 F.3d 468, 471 (11th Cir. 1996); *cf.*

Havertisck, 32 F.3d at 995 (distinguishing between officers engaged in passive peace-keeping conduct during a lawful eviction and activity designed to facilitate an unlawful interference with possessory interests).

Defendants claim that they were not attempting to deprive Plaintiffs of their property rights and indeed did not believe that Plaintiffs had any such rights because it was unclear at the time whether Plaintiffs were "shelter residents" or "tenants".[12] Defendants admit that had they known Plaintiffs were tenants of the Augusta House, they would not have evicted them. But they argue that they are entitled to qualified immunity if they mistakenly, but reasonably, concluded that Plaintiffs were not tenants even though they now admit in hindsight that Plaintiffs were indeed tenants. The qualified immunity doctrine generally encompasses judgmental errors. However, Defendants had an opportunity to resolve this question prior to evicting Plaintiffs, but they failed to do so. The officers concede that Plaintiffs told them that they paid rent, were protected by landlord-tenant law, and claimed an entitlement to remain at the residence absent an eviction notice. It is clear that the officers never undertook

---

[12] Certain living arrangements are excluded from coverage under the Kentucky URLTA, including: "residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational counseling, religious, or similar service." K.R.S. § 383.535. Defendants briefly claim in their reply brief that Plaintiffs' living arrangements at Augusta House could fall within this exclusion due to the financial and religious counseling services provided by Mission House, Inc. staff. However, Defendants have conceded for purposes of this appeal that Plaintiffs are tenants under Kentucky law.

to determine whether Plaintiffs were in fact tenants. They merely claim that it was objectively reasonable for them to rely upon Zinious' representations to the contrary and that they were not required to believe Plaintiffs' story. While Officer Cushman's previous interaction with Plaintiffs is not dispositive, we find it relevant that Cushman realized only the evening before the eviction that he had no legal basis for forcing Plaintiffs out onto the street. Under these circumstances, we find that this case presents more than mere mistaken judgment, but rather an unwarranted failure to make the determinations necessary prior to taking hasty action. Thus, we are unable to rationalize the officers' failure to ensure any form of process prior to evicting Plaintiffs.

For the same reasons, I believe that Defendants are not entitled to qualified immunity on the Fourth Amendment claim. As we indicated in *Flatford*, "the Fourth Amendment standard of reasonableness requires no more of government officials than that of due process of law. Both constitutional provisions recognize an exigency exception, and, thus, lead to no practical distinction in this case." *Flatford*, 17 F.3d at 170 (citations and internal quotation marks omitted). Furthermore, *Soldal* was a unanimous Supreme Court decision decided well before the incidents giving rise to Plaintiffs' complaint occurred. In addition, *Soldal* merely refined well-settled rules of law. Thus, it was clear in this Circuit at the time of the eviction that Plaintiffs had a right not to have their possessory interests in property encumbered by the type of unreasonable seizure that occurred in this case. Objectively reasonable officers in the same circumstances would have known that they were violating Plaintiffs' Fourth Amendment rights. I therefore conclude that Defendants are

not entitled to qualified immunity with respect to Plaintiffs' unreasonable seizure claim.

IV. CONCLUSION

Based upon Supreme Court and Sixth Circuit precedent, we hold that Plaintiffs' eviction from the Augusta House constituted a violation of their clearly established Fourteenth Amendment rights. In addition, we find that the officers had no reasonable basis to believe that the eviction was justified in the absence of exigent circumstances. Accordingly, Defendants are not entitled to qualified immunity and the district court's decision is **AFFIRMED** with respect to the Fourteenth Amendment claims. Defendants are entitled to qualified immunity as to Plaintiffs' Fourth Amendment claims, and as to those claims the district court is **REVERSED**.

CONCUR and DISSENT

RONALD LEE GILMAN, Circuit Judge, concurring in part and dissenting in part. I concur in the lead opinion's determination that, at least at the summary judgment stage, the police officers in the present case are not entitled to qualified immunity with regard to the plaintiffs' due process claim under the Fourteenth Amendment. But I disagree with the lead opinion's conclusion that the officers are not entitled to qualified immunity on the plaintiffs' seizure-of-property claim under the Fourth Amendment. I therefore respectfully dissent from that portion of the lead opinion.

The plaintiffs allege that their real estate interest was unreasonably seized when the officers evicted them from the

shelter in which they were living. Even assuming that an unreasonable seizure occurred, the officers are entitled to qualified immunity so long as they did not violate clearly established constitutional or federal statutory rights in conducting the eviction. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). A right is "clearly established" only where the contours of that right are so clear "that a reasonable official would understand that what he is doing violates that right." *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002). To determine if a right is clearly established, this court "looks first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Key v. Grayson*, 179 F.3d 996, 999-1000 (6th Cir. 1999).

The constitutional right to be free from the unreasonable seizure of property is clearly established. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). Whether the eviction that occurred in the present case constitutes a seizure of property, however, is anything but clear. In evicting the plaintiffs from the shelter, the officers did not take physical possession of the property. The officers in fact did nothing more than escort the plaintiffs from their place of residence. I can find no published opinion anywhere holding that an eviction under these circumstances is a seizure of property for the purpose of the Fourth Amendment.

In concluding that the eviction in this case was a seizure of property, the lead opinion relies upon *United States v. Jacobsen*, 466 U.S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652

(1984), and *Soldal v. Cook County*, 506 U.S. 56, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992). Both of these cases, however, involved conduct that included the taking of physical control over the property in question. The government actors in *Jacobsen* seized property when they took "dominion and control" over a package and destroyed its contents in a field narcotics test. 466 U.S. at 120, 125. Likewise, the seizure of property in *Soldal* occurred when the government actors helped conduct an eviction by physically removing a mobile home from its foundation. 506 U.S. at 72.

Although a government official may be held liable for violating a clearly established right even if that right has not been explicitly recognized, precedent must exist that makes the unlawfulness of the official's conduct "apparent." *Risbridger,* 275 F.3d at 569. But I am hard-pressed to conclude that the eviction in this case was a seizure of property at all, much less that precedent made it clear to the officers that their conduct in fact constituted such a seizure. The term "seizure," in my view, connotes a physical act of control or possession over the item seized, and both the Supreme Court and this court have consistently construed the term within the bounds of its plain meaning. *E.g., Soldal*, 506 U.S. at 72; *Flatford v. City of Monroe*, 17 F.3d 162, 169-70 (6th Cir. 1994) (concluding that a seizure of property occurred where government actors evicted the plaintiffs in the course of condemning their apartment building).

In any event, I do not believe that we need to decide whether a seizure actually took place in this case, because, at the very least, a reasonable person in the officers' position would not have known that the eviction in question violated the plaintiffs' Fourth Amendment right to be free from the

unreasonable seizure of their real estate interest. I would therefore affirm the district court's decision to deny qualified immunity on the plaintiffs' due process claim, but would reverse the district court's determination that the plaintiffs are entitled to proceed to trial on their seizure-of-property claim.

WALLACE, Circuit Judge. I concur with Judge Gilman that the officers are entitled to qualified immunity on the Fourth Amendment claim because any Fourth Amendment right not to be evicted, if there is one, has not been demonstrated to be a seizure and has not yet been clearly established. I dissent, however, from the majority's conclusion that there is a genuine issue of material fact as to whether the officers are entitled to qualified immunity on the Fourteenth Amendment Due Process claim. I would reverse.

The qualified immunity doctrine has been described in the following terms: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). To determine whether the officers in this case are entitled to this immunity, we first ask whether "the facts alleged show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If we determine that a constitutional right has been violated, we then "ask whether the right was clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer

that his conduct was unlawful in the situation he confronted." *Id.* (citation and quotation marks omitted).

Further,

> the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether [his response to those facts] is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Id. at 205.

With respect to the initial inquiry, I agree with the majority that plaintiffs had a constitutional right to predeprivation process-assuming, as we are for purposes of this appeal, that plaintiffs were deprived of a property interest by virtue of their status as alleged tenants. However, I part with my colleagues on whether that right was clearly established because I believe it would not have been clear to a reasonable officer, under the circumstances confronted by the officers in this case, that plaintiffs had a property interest in and therefore a right not to be prematurely evicted from Augusta House. *See Harlow*, 457 U.S. at 818 ("On summary judgment, the judge appropriately may determine, not only

the currently applicable law, but whether that law was clearly established at the time an action occurred.").

Consider the circumstances. Plaintiffs were living in a transitional women's shelter or half-way house. Normally, shelter occupants in Kentucky have no property interest in the shelter and thus no right to pre-eviction process either because the occupant is not a tenant, Ky. Rev. Stat. Ann. § 383.545(15) (defining tenant), or because the shelter is exempt from Kentucky landlord-tenant law, *Id.* § 383.535. Indeed, all four officers testified that they did not believe that plaintiffs and Augusta House had a landlord-tenant relationship.

When the officers were dispatched to Augusta House, they were told that it was a shelter. When they arrived at the scene, Laura Zinious approached them and identified herself as the shelter director. She told them that the plaintiffs had violated shelter rules, that they had refused to leave, and that it was "standard practice" for the police to assist with their removal. Thus, the officers had every reason to believe, at least at first, that plaintiffs had no property interest in the shelter.

A reasonable officer, though, still might have asked plaintiffs for more information about the Augusta House living arrangements. However, when the officers entered Augusta House, plaintiffs made it impossible for the officers to inquire further. Officer Cohen testified that "all three of them were yelling so loudly and cussing, it was hard to even talk to one of them." When asked if he was "able to discern what [plaintiffs] anger was about," Officer Craig responded:

> again, not specifically. As I recall, they were just-all three of them were talking and yelling all at one time, not really any good, usable information from that, other than just trying to calm them down and maintain order just for safety reasons, initially.

Further, Officer Fischer's deposition reveals the following:

> Q.And was that the first thing that got said to them, that they needed to get ready and leave?
> A. We asked them if-how did we put that. We asked them if they lived there or stayed there or whatever the-we couldn't distinguish, you know, from one to the other because they were all yelling and screaming and carrying on. They were ticked off at her [Zinious], they were being belligerent towards her, so it was hard to keep them all calm to get any common sense out of anybody.
>
> . . .
>
> Q. Okay. Were there any discussions that you heard between the officers and the manager while you were at the house?
> A. To be honest with you, quite frank with you, no, because it was too loud. It was hard to distinguish who was talking to who.
> Q. Nobody was listening to anybody else?

> A. Exactly. It was-like I told you, it was tumultuous. Like I told you, everything was going everywhere.

And finally, we learn from Officer Embry that "any attempts that [he] had to discuss anything with [plaintiffs] was met with loud, foul language."

True, plaintiffs' written declarations state that Natasha Thomas told the officers the plaintiffs "paid rent and had rights." But plaintiffs never dispute that Thomas was in the midst of an uncontrollable outburst when she tried to communicate this to the officers. Plaintiffs' own behavior, then, prevented the officers from determining the true nature of the Augusta House living arrangements. In a footnote, Judge Clay suggests that I mistakenly view the evidence on this point in the defendants' favor. Our obligation to view the evidence in the plaintiffs' favor, however, arises only when the "defendant disputes the plaintiffs' version of the story." *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). As I have already said, defendants' testimony that plaintiffs' own behavior inside Augusta House prevented any communication is undisputed. We must therefore accept defendants' testimony in this regard on its face.

Because further inquiry was made impossible, it was reasonable for the officers to rely on their initial conclusion that Augusta House was a traditional shelter and, consequently, that plaintiffs could, indeed should, be removed without pre-eviction process. In hindsight, this may have been a mistake. Because it was impossible to determine the exact nature of the Augusta House living arrangements, however, it was just the kind of "reasonable mistake[]" that the

qualified immunity doctrine was designed to protect. *Saucier*, 533 U.S. at 205.

The lead opinion makes much of the fact that Officer Cushman concluded that he could not legally remove plaintiffs after he was dispatched to Augusta House the night before the incident here in question. Our inquiry, however, is not whether *an* officer would have concluded that plaintiffs were tenants. Rather, it is whether it would have been unreasonable for an officer in the same circumstances to act as the officers in this case did. While I applaud Officer Cushman for guessing right, he made that call under different circumstances. From Officer Cushman's deposition, it does not appear that he was told that the house was a shelter. Moreover, upon arrival, he was met by the Augusta House maintenance man, not the shelter director. And, most importantly, he was able to communicate with plaintiffs upon entering the house. Because the circumstances he confronted were entirely different, his reaction to those circumstances tells us little or nothing about whether it was reasonable for the officers in this case to tell the plaintiffs to leave Augusta House.

I would reverse the district court's denial of the officer's Motion for Summary Judgment because I believe the officers are entitled as a matter of law to qualified immunity on plaintiffs' Fourth and Fourteenth Amendment claims.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-719-S

[Filed December 15, 2000]

NATASHA THOMAS, et al.
PLAINTIFFS

v.

ANN COHEN, et al.
DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the Defendants' motion for summary judgment. For the reasons described below, we will deny this motion by separate order entered this date.

FACTS

This case arises out of actions taken by the Defendants, officers on the City of Louisville Police Department, to remove the Plaintiffs from the Augusta House, a "transitional shelter" for women operated by

Mission House, Inc., located in Louisville. The following facts are undisputed for the purposes of this motion unless otherwise noted.

The Plaintiffs, Natasha Thomas ("Thomas"), Susan Gibbs ("Gibbs"), and Edwina Lewis ("Lewis"), were residents of the Augusta House in the fall of 1998. Augusta House was a shelter for women attempting to acclimate themselves into mainstream society. A dispute arose between the Plaintiffs and the Director of the Augusta House, Laura Zinious ("Zinious"). Zinious took steps to have the Plaintiffs removed from the house.

While the dispute was brewing, the Plaintiffs met with an attorney at the Legal Aid Society, Linda Roberts, who informed them that, in her legal opinion, they were "tenants" of the Augusta House and could not be removed unless Zinious followed Kentucky's statutory eviction ("forcible detainer") procedures. She wrote a letter to Zinious stating this opinion. The Plaintiffs obtained a similar letter from the Louisville Tenants Association ("LTA"), a tenant advocacy group.

On Monday, December 7, 1998, Officer Larry Cushman ("Cushman") was called to the scene by an Augusta House maintenance man and prepared to remove the Plaintiffs from the house. Based upon information supplied to him by the Plaintiffs, including the letter from the LTA, Officer Cushman declined to remove the Plaintiffs from the house unless the Augusta House proceeded with a civil forcible detainer action. Officer Cushman is not a party to this action.

The next morning, Zinious called the police again to have the Plaintiffs removed. The Defendants, Officer Ann Cohen, Officer Glenn Craig, Officer James Embry, and Officer Susan Harbour, were called to the scene to handle the situation.

The facts at this stage are murkier. The Plaintiffs state that the Defendants entered their rooms and announced that they would have to leave the premises. The Plaintiffs allege that they informed the Defendants that they paid monthly rent to the Augusta House and showed or offered to show them the letter from LTA. Nevertheless, it is undisputed that the Defendants eventually caused the Plaintiffs to leave Augusta House. No court order had been sought or obtained.

The Plaintiffs have filed suit against the Defendants in their individual capacities under 42 U.S.C. section 1983. The Plaintiffs allege that the Defendants violated their Fourth Amendment right to be secure in their property against unreasonable seizures, their Fourteenth Amendment right to procedural due process before being deprived of property, and their rights under Kentucky law which mirror these federal rights.

The Defendants now move for summary judgment. First, they argue that the Defendants did not violate the Constitutional rights of the Plaintiffs. Second, they argue that even if Constitutional rights were violated, they are entitled to qualified immunity because the rights were not so clearly established that a reasonable officer would understand that his or her actions violate that right. We address these arguments in turn.

DISCUSSION

Summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). We must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in the light most favorable to the Plaintiffs. *Id.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The Plaintiffs may not rely on their pleadings alone, but must demonstrate the existence of a genuine dispute by pointing to specific facts. *Id.* at 586-87, 106 S.Ct. at 1356. Also, we may not weigh evidence or make determinations of credibity. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

Section 1983 is violated if a plaintiff is deprived, under color of state law, of any right secured by the Constitution. However, qualified immunity may protect against liability for such a claim unless the Plaintiffs can establish that a two part test is satisfied. First, the Plaintiffs must show that the Defendants deprived them of a right protected by the Constitution. Second, this right must be so clearly established that a reasonable officer would understand that his or her actions would violate that right. *Cooper v. Parrish*, 203 F.3d 937, 951 (6th Cir. 2000).

1. § 1983

In order to violate section 1983, a police officer must deprive a plaintiff of a right secured by the laws or

Constitution of the United States. In this case, the Plaintiffs allege that two of their Constitutional rights were violated: (1) their Fourth Amendment right to be secure in their property against unreasonable seizures and (2) their Fourteenth Amendment right to procedural due process before being deprived of property. For purposes of this motion, the Defendants assume, *arguendo*, that the Plaintiffs were "tenants" of the Augusta House as that term is used in Kentucky law. *See* K.R.S. § 383.545(15). Our analysis here is consonant with this assumption. We note this only to make clear that the Defendants do not concede the point and that they will contest the Plaintiffs' status as tenants at trial.

A. Fourth Amendment

The Plaintiffs allege that by dispossessing them of their right to occupy their rooms at the Augusta House, the Defendants seized their property. They contend that for a variety of reasons the seizure was unreasonable. In their motion, the Defendants argue that no seizure occurred, only a "garden variety landlord-tenant dispute" which resulted in the Plaintiffs' being thrown out. They also argue that even if a seizure did occur, they did not act in an unreasonable manner.

i. Seizure

If the Plaintiffs were tenants, which is assumed *arguendo*, it is clear they were evicted from their tenement with the active assistance of the Defendants. A seizure occurs when "there is some meaningful interference with an individual's possessory interests in . . . property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656,

80 L.Ed.2d 85 (1984). The "core" of the Fourth Amendment is "the right of a man to retreat into his own home." *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961). This protection applies in civil contexts as well as criminal. *Soldal v. Cook County, Illinois*, 506 U.S. 56, 67, 113 S.Ct. 538, 546, 121 L.Ed.2d 450 (1992). Thus, it follows that when the police escort a person from the place where she lives, a seizure is effected within the meaning of the Fourth Amendment. There is no reason to believe that the result should be different simply because the property right is only possessory, as in the case of a tenant, rather than full ownership. Recognizing this fact, a unanimous Supreme Court stated that the Fourth Amendment applies when a house is taken in order to "effect an eviction by the police." *Id.*, at 69, 113 S.Ct. at 548. Under the facts and assumptions presented here, we find that Fourth Amendment seizure has been sufficiently shown to withstand summary judgment.

ii. Reasonableness

Of course, *Soldal* recognized that most evictions and repossessions do not constitute a violation of the Fourth Amendment. *Id.* at 71, 113 S.Ct. at 549. This is because "'reasonableness is still the ultimate standard' under the Fourth Amendment." *Id.* (quoting *Camera v. Municipal Court of San Francisco*, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967)). When police officers evict someone pursuant to a court order, it would be a "laborious task" to show that their actions are unreasonable, and the police will seldom "proceed to seize property in the absence

of objectively reasonable grounds for doing so."[1] *Id.* at 71-72, 113 S.Ct. at 549.

In this case, however, the Defendants did not act pursuant to a court order. There is no allegation that the Plaintiffs were engaged at the time in criminal activity or that there were other circumstances present which would have required immediate action on their part.

The reasonableness determination should reflect a "careful balancing of governmental and private interest." *New Jersey v. T.L.O.* 469 U.S. 325, 341, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985). The private interest of retaining possessory rights over one's home is great. The government's interest in removing tenants from their homes when there is no court order or exigent circumstance is minimal at best. Thus, assuming for the purposes of this motion that the Plaintiffs were tenants within the meaning of Kentucky law, there is a sufficient showing that the seizure alleged in this case was unreasonable under Fourth Amendment standards.

B. Fourteenth Amendment

The Fourteenth Amendment provides that no State shall "deprive any person of . . . property without due process of law; . . .." The Plaintiffs allege that by removing them from the Augusta House before they were afforded an

---

[1] Because the lower courts had not addressed the issue of reasonableness, *Soldal* remanded the case without addressing that issue. *Id.*

opportunity to be heard in a forcible detainer action, the Defendants deprived them of their property rights without due process.

The Defendants argue that they are entitled to summary judgment on this charge for four reasons. First, they contend that they are not covered by, and thus, are not capable of violating Kentucky's Uniform Residential Landlord and Tenant Act, K.R.S. §§ 383.500, *et seq*, ("URLRA"). However, the Plaintiffs do not claim that they violated URLTA. Instead they claim that the Defendants unreasonably seized their property without affording them the process due.

Second, the Defendants argue that a violation of URLTA cannot support a claim under section 1983. Again, it is not claimed that the Defendants violated the Plaintiffs' rights under Kentucky law but under the Constitution. Kentucky law is only relevant in determining the process which is due.

Third, the Defendants contend that this case should be limited to a Fourth Amendment analysis. This contention is unavailing in light of the fact that the due process violation alleged in procedural, not substantive.

Fourth, they argue that because Kentucky law provides adequate post-deprivation hearings, there can be no due process violation. Their argument is premised upon the holding in *Reese v. Kennedy*, 865 F.2d 186 (8th Cir. 1989), a case with a similar facts. However, we find this case unpersuasive for several reasons. First, the case was decided before *Soldal* and *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994)(holding that lack of pre-deprivation hearing

violated tenants' due process rights), two cases which undercut its foundations. Second, *Reese* is not binding upon us, and even if it were, we would agree with *Flatford*, that a post-deprivation hearing is insufficient to satisfy due process in facts such as those presented here. Finally, we note that Kentucky provides for a pre-deprivation hearing, and so we are not convinced that one is "impracticable." *See Parratt v. Taylor*, 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981).

2. QUALIFIED IMMUNITY

Police officers enjoy a qualified immunity from suit in federal courts. They can only be held liable if a plaintiff can satisfy a two step test. First, the plaintiff must allege the deprivation of a constitutionally protected right. *Cooper v. Parrish*, 203 F.3d 937, 951 (2000). We have already determined that the Plaintiffs have alleged a deprivation of two constitutional rights. Second, they must show that the constitutional right is so "clearly established" that a reasonable officer would understand that what he is doing violates the law. *Id.* The question, then, is "whether the agents acted reasonably under settled law in the circumstances . . . ." *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991). The question of immunity is typically one for the court to decide rather than the jury. *Id.*

The provisions and cases that we have relied upon indicate that the law was not unclear or unsettled at the time of the events in question. *Soldal*, a unanimous decision, was decided in 1992 and relied upon well-settled rules of law. Likewise, Kentucky law on forcible detainers is well-established. Thus, a reasonable officer knows that the

Constitution prohibits him from seizing property unreasonably or without procedural due process. He would then be aware of the fact that he could not evict a tenant from her home except under exigent circumstances or pursuant to a court order and the fact that he was not in a position to make the determination of whether she qualified as a tenant. The Plaintiffs present sufficient evidence to create a genuine dispute as to whether the Defendants acted unreasonably in violation of these understandings. Therefore, we find that the Defendants are not entitled to summary judgment on the issue of qualified immunity.

2. Kentucky Constitutional Claims

The parties agree that the Plaintiffs' claims under the Kentucky Constitution parallel the federal claims already addressed. Thus, our determination of the federal claims should control our ruling on these claims. Therefore, we find that there is a genuine issue of material fact such that the Defendants are not entitled to summary judgment.

CONCLUSION

The Defendants have failed to demonstrate that there is no genuine issue of material fact and that they are entitled to a judgment as a matter of law. Therefore, their motion for summary judgment will be denied by separate order entered this date.

This 15th day of December, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:99CV-719-S

[Filed December 15, 2000]

NATASHA THOMAS, et al.	)
PLAINTIFFS	)
	)
v.	)
	)
ANN COHEN, et al.	)
DEFENDANTS	)
	)

ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Defendants' motion for summary judgment is **DENIED**.

IT IS SO ORDERED this 15th day of December, 2000.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
APR 7 2003
CLERK

No. 02-1293

In The
Supreme Court of the United States

ANN COHEN; GLENN CRAIG;
JAMES EMBRY; SUSAN FISCHER,
in their individual capacities,

Petitioners,

v.

NATASHA THOMAS; SUSAN GIBBS;
EDWINA LEWIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID A. FRIEDMAN
FERNANDEZ FRIEDMAN GROSSMAN
KOHN & SON PLLC
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001

Counsel of Record
for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in applying settled law to specific facts when it held that police who conduct unlawful non-judicial evictions deprive tenants of protected property interests without due process of law?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
ARGUMENT	4
I. Respondents Seek Plenary Review Merely To Challenge The Sixth Circuit's Application Of Established Law To Particular Facts	4
II. There Is No Significant Conflict In The Federal Appeals Courts	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Roth, 408 U.S. 564 (1972) 5

Boddie v. Connecticut, 401 U.S. 371 (1971) 5, 6

Caine v. Hardy, 943 F.3d 1406 (5th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992) 9

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 4

Connecticut v. Doehr, 501 U.S. 1 (1991) 5

Flatford v. City of Monroe, 17 F.3d 162 (6th Cir. 1994) 8, 10

Fuentes v. Shevin, 407 U.S. 67 (1972) 5, 6

Harris v. Akron, 20 F.3d 1396 (6th Cir.), *cert. denied*, 513 U.S. 1001 (1994) 8

Hope v. Pelzer, ___ U.S. ___, 122 S.Ct. 2508 (2002) 4, 9, 10

Mackey v. Dyke, 29 F.3d 1086 (6th Cir. 1994), *aff'd after remand on different grounds*, 111 F.3d 460 (6th Cir.), *cert. denied*, 522 U.S. 848 (1997) 8

Matthews v. Eldridge, 424 U.S. 319 (1976) 5

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 6

O'Neill v. Baker, 210 F.3d 41 (1st Cir. 2000) 9

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986) 4, 7, 8, 9

Reese v. Kennedy, 865 F.2d 186 (8th Cir. 1989) 8

TABLE OF AUTHORITIES – Continued

Page

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 5

United States v. $8,850, 461 U.S. 555 (1983) 5

United States v. Good Real Property, 510 U.S. 43 (1993) 5, 6, 7

Zinermon v. Burch, 494 U.S. 113 (1990) 4, 7, 8, 9, 10

CONSTITUTIONS

U.S. Const. amend. IV 3

U.S. Const. amend. XIV 3, 4

STATUTES

Ky. Rev. Stat. §§ 383.200 *et seq.* 5

Ky. Rev. Stat. §§ 383.500 *et seq.* 5

STATEMENT OF THE CASE

Natasha Thomas (Thomas), Susan Gibbs (Gibbs) and Edwina Lewis (Lewis) lived at Augusta House in the fall of 1998. [Petition for Writ of Certiorari Appendix (Pet. App.) 4a-8a.][1] Augusta House is an undivided house located in Old Louisville, a residential neighborhood in Louisville, Kentucky. At the time, Mission House, Inc., owned Augusta House and Laurie Zinious (Zinious) managed it.

Each tenant had her own bedroom, but shared the rest of the house in common. They kept and cooked their own food, kept their own cosmetics and personal effects, did their own housekeeping and came and went as they pleased. They each had a key to the house; no one other than Augusta House residents lived there. Augusta House charged each tenant $140 per month to live there.

By late November, Zinious and the tenants were having disputes. The three tenants decided to seek legal advice from a Legal Aid Society (LAS) attorney. The attorney, Linda D. Roberts (Roberts), concluded from the above facts that her clients were Augusta House's tenants and could be evicted only in accordance with Kentucky landlord-tenant law. She advised them in detail of the steps Augusta House would have to take to evict them lawfully and explained the time frames involved in the process. Roberts also agreed to write to Zinious, explaining her opinion. After meeting with Roberts, the tenants went

---

[1] The petitioners acknowledge that most relevant facts are undisputed [Petition for Writ of Certiorari (Pet.) at 3] and concede that, for qualified immunity purposes, all facts must be construed in respondents' favor. [*Id.* at 3 n.3.] Those facts are fully summarized at Pet. App. 4a-8a.

to the office of the Louisville Tenants Association (LTA), a tenant advocacy group. The LTA agreed to provide letters articulating a position similar to Roberts'.

The following Monday night, December 7, 1998, Augusta House's maintenance worker, Raymond O'Rafferty (O'Rafferty) appeared at the house with Louisville police. Officer Larry Cushman explained to the tenants that O'Rafferty had asked him to evict them. Cushman saw that Augusta House looked like a residence, he didn't witness any illegal activity and he determined that Augusta House had not served any eviction papers. Thomas also showed Officer Cushman her LTA letter. Officer Cushman told O'Rafferty that this was a civil dispute and that he would have to go through court to evict the tenants. O'Rafferty then called Zinious and told her what had taken place.

The next morning, Tuesday, December 8, 1998, the four respondent police officers appeared at Augusta House to evict the tenants. Three of the four knew that, if the tenants paid rent, their removal was a civil matter requiring Augusta House to evict them through court. They nevertheless failed to ask the tenants whether they paid rent. Instead, they simply told the tenants that they would have to get out. And they made that decision after Zinious informed them that this was "standard procedure."

The tenants (having already sought legal counsel and fended off police once) insisted that they paid rent, had keys and had the right to remain there. Thomas even showed one police officer her LTA letter, but to no avail. At Lewis' urging, Gibbs called Roberts and told her that the police were evicting them without judicial process. While Gibbs was speaking with Roberts, petitioner James Embry

told her to get off the phone and leave Augusta House immediately. The tenants explained that Gibbs was speaking with their lawyer. Embry laughed and said that the tenants were homeless and didn't have a lawyer.

The women then left Augusta House under police order. They immediately went to Roberts' office at LAS. Roberts filed suit on the tenants' behalf against Mission House, Inc., and, through settlement, secured alternative housing for them several days later.

The three tenants filed suit against the petitioner police officers. The district court denied the petitioners' summary judgment motion on qualified immunity grounds; in so doing, the district court held that – construing disputed facts favorably to the tenants – the officers' non-judicial eviction violated clearly established Fourth Amendment seizure and Fourteenth Amendment due process law. [Pet. App. 57a-58a.]

On appeal, a divided panel affirmed the district court's due process decision, but a differently-divided panel reversed the district court's seizure decision. [Pet. App. 3a-48a.] The Sixth Circuit denied panel and *en banc* rehearing. [Pet. App. 1a-2s.]

REASONS FOR DENYING THE WRIT

Review is inappropriate for two reasons. First, the Sixth Circuit correctly applied settled law in finding that the petitioners' conduct violated clearly established due process law. The petitioners merely seek to correct what they perceive as an incorrect application of well-settled legal principles.

Second, there is no real conflict among the circuits. While the courts of appeals have had to wrestle with application of two cases to specific facts, that is the natural result of this Court's decisions. The cases are harmonious and the courts of appeals have faithfully applied them. *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Zinermon v. Burch*, 494 U.S. 113 (1990), establish the substantive law governing when officials commit "random and unauthorized" acts, so as to preclude predeprivation process. And *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002), establishes that prior cases need not involve "fundamentally similar" facts to constitute "fair warning" that certain conduct was unconstitutional, thus depriving officials of qualified immunity. Difficulty in applying these clear principles to specific sets of fact does not imply any uncertainty in the principles or any conflict in their application.

ARGUMENT

I. Respondents Seek Plenary Review Merely To Challenge The Sixth Circuit's Application Of Established Law To Particular Facts.

This Court's procedural due process and qualified immunity law provides clear guidance and the Sixth Circuit merely applied those cases to particular facts here. The Fourteenth Amendment prohibits states from depriving a person of property without "due process of law." U.S. Const., amend. XIV, § 1. But "[p]roperty interests are not created by the Constitution." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source

such as state law. . . . " *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Kentucky law protects tenants' leasehold interests. *See* Ky. Rev. Stat. §§ 383.200 *et seq.*; Ky. Rev. Stat. §§ 383.500 *et seq*. This is not surprising, for leasehold interests, like other interests in real property, are "of historic and continuing importance." *United States v. Good Real Property*, 510 U.S. 43, 53-54 (1993) (holding that *ex parte* forfeiture hearing violates due process); *see also Connecticut v. Doehr*, 501 U.S. 1 (1991) (holding that state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional).

At issue in this case, then, was whether the police afforded the tenants the process that was due before depriving them of their leasehold property interests. The "root requirement" of due process is "that an individual be given an opportunity for a hearing before [she] is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). This Court's decisions "establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *Good Real Property*, 510 U.S. at 48. And that rule applies to welfare benefits, goods and chattels, kitchen appliances, household furniture, and wages. *See Matthews v. Eldridge*, 424 U.S. 319 (1976) (social security disability benefits); *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) ("absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified"); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("whatever its form, opportunity for . . . hearing must be provided before the deprivation at issue takes effect"); *Sniadach v. Family Finance*

Corp., 395 U.S. 337, 342 (1969) (Justice Harlan, concurring) ("absent notice and a prior hearing ... this prejudgment garnishment procedure violates the fundamental principles of due process") (citation omitted); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Nor is this core principle merely symbolic or academic. On the contrary, its purpose "is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect [her] use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property. . . . " *Fuentes,* 407 U.S. at 80-81.[2]

Consistent with these principles, this Court held in *Good Real Property* that seizure of real property subject to civil forfeiture under federal drug laws violated due process when preceded only by an *ex parte* hearing before a Magistrate Judge. *Id.*, 510 U.S. at 54-56. The Court concluded that *ex parte* seizure creates an "unacceptable risk of error," *id.* at 55, and affords "little or no protection to the innocent owner." *Ibid.* Nor might "the availability of a postseizure hearing ... [provide] recompense for losses caused by erroneous seizure." *Id.* at 56.

---

[2] Exceptions to the requirement of predeprivation notice and hearing are allowed only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie*, 401 U.S. at 379; *accord*, *Fuentes*, 407 U.S. at 82; *Good Real Property*, 510 U.S. at 501. Here, there is no hint that extra-judicial police evictions serve any valid governmental interest, much less an extraordinary one.

Good Real Property compels the same results here, as the Sixth Circuit held. [Pet. 28a-30a.] These extra-judicial police evictions created an unacceptable risk of error, afforded little or no protection to the tenants, and did not allow for adequate recompense in a postseizure hearing. And this case involved less process or governmental purpose than *Good Real Property*. There, the government sought to fight illegal drugs. Here, the tenants committed no crime; rather, the police merely enforced Zinious' civil property interests. There, a Magistrate Judge held a preseizure (albeit *ex parte*) hearing. Here, the police circumvented the adversarial judicial hearing required by Kentucky law.

The respondents nevertheless argue that the police eviction here did not violate due process because the evictions were "random and unauthorized" under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), thus obviating the need for, and efficacy of, predeprivation process. [Pet. 7-13.] And they argue that the Sixth Circuit wrongly deemed *Zinermon v. Burch*, 494 U.S. 113 (1990), to limit *Parratt* and to control here.

But *Parratt* and *Zinermon* are harmonious and the Sixth Circuit merely applied their principles to these facts. In *Parratt*, this Court held that property deprivations resulting from "random and unauthorized" governmental actions did not violate procedural due process so long as the government provided adequate post-deprivation remedies. *Id.*, 451 U.S. at 541-44. And in *Zinermon*, 494 U.S. at 128, this Court stated that *Parratt* is a "special

case . . . in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide."[3] Here, the state was in a position to provide for predeprivation process and did so by statute. The landlord-tenant laws allow for prompt, summary adjudication of possession disputes. That, not the extrajudicial conduct of the police here, is what due process requires, as the Sixth Circuit correctly held.

II. There Is No Significant Conflict In The Federal Appeals Courts.

The petitioners correctly note that the decision below conflicts with *Reese v. Kennedy*, 865 F.2d 186 (8th Cir. 1989). [Pet. 8.] But *Reese* predated *Zinermon* and its broad reading of *Parratt* is foreclosed by *Zinermon*'s narrower reading, as the Sixth Circuit correctly held. [Pet. App. 34a-35a.]

Nor do the other circuit court cases petitioners cite reflect "confusion" in applying *Parratt* and *Zinermon*.

---

[3] Recognizing this, the Sixth Circuit has held *Parratt* inapplicable to an eviction case, even in an emergency, because "post-deprivation state tort remedies are neither timely nor sufficiently remedial. . . . Fundamental fairness expects more of a state than mere tort remedies where government dispossesses its citizens from their homes." *Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994). *See also Mackey v. Dyke*, 29 F.3d 1086, 1093 (6th Cir. 1994), *aff'd after remand on different grounds*, 111 F.3d 460 (6th Cir.), *cert. denied*, 522 U.S. 848 (1997) (*Parratt* inapplicable where government "was in a position to provide for predeprivation process"); *Harris v. Akron*, 20 F.3d 1396, 1402 (6th Cir.), *cert. denied*, 513 U.S. 1001 (1994) (*Parratt* inapplicable where state provides predeprivation procedure for depriving person of rights).

Rather, they make the unremarkable point that line-drawing – including traversing the boundary between *Parratt* and *Zinermon* – can be difficult; but it is a difficulty fully familiar to courts. Thus, for example, *O'Neill v. Baker*, 210 F.3d 41 (1st Cir. 2000), "viewed *Zinermon* as a case in which state law did authorize the procedure followed (albeit unconstitutionally), so that the act of the officials could not be described as random and unauthorized." *Id.*, 210 F.3d at 50 (internal quotation marks omitted). Here too, Kentucky law permits law enforcement officials to evict tenants, but only when executing a judicial writ of possession – that is, only after affording predeprivation process. *Caine v. Hardy*, 943 F.3d 1406 (5th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992), deemed *Zinermon* to "not explicitly or implicitly disavow . . . *Parratt* . . . " but instead to "require[] case-by-case analysis of the deprivation at issue." *Id.*, 943 F.3d at 1415. And application of *Zinermon* and *Parratt* requires courts to "determine whether the state officials' conduct, under all the circumstances, could have been adequately foreseen and addressed by procedural safeguards." *Id.* Here again, the Sixth Circuit concluded that Kentucky could and did foresee the wrongful eviction of tenants by providing procedural safeguards.

The courts of appeals thus understand how *Parratt* and *Zinermon* mesh together. The petitioners merely quarrel with the Sixth Circuit's application of those familiar principles to these facts. Their quarrel does not warrant this Court's review.

Nor does *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508 (2002), undercut the Sixth Circuit's qualified immunity decision. The court of appeals deemed several of its and

this Court's cases to give the "fair warning" of unconstitutionality that *Hope* requires. Most notably, *Flatford* applied *Zinermon* to hold that even emergency evictions required resort to a state's prescribed predeprivation process, because "post-deprivation state tort remedies are neither timely nor sufficiently remedial. . . . Fundamental fairness expects more of a state than mere tort remedies where government dispossesses its citizens from their homes." *Id.*, 17 F.3d at 169. Nothing about the Sixth Circuit's decision conflicts with this Court's qualified immunity cases, is inconsistent with *Hope* or creates any circuit conflict.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the fact-specific inquiry demanded by this Court. There is no meaningful conflict with decisions of another circuit court. Because there are no grounds for granting plenary review, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

DAVID A. FRIEDMAN
FERNANDEZ FRIEDMAN GROSSMAN
KOHN & SON PLLC
2400 National City Tower
101 S. Fifth Street
Louisville, KY 40202
(502) 589-1001

Counsel of Record for Respondents